90-1550

No. 90-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTERLENE HOLMES, EDNA ROSE MCCOY, DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD,

Petitioners,

v.

CHICAGO TEACHERS UNION, LOCAL No. 1., ROBERT HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, GLENDIS HAMBRICK, Individually and as Officers of the Chicago Teachers Union, BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS, RAOUL VILLALOBOS, MARTHA JANTHO, THOMAS CORCORAN, BETTY BONOW, SOL BRANDZEL, CLARK BURRUS, LEON JACKSON, ROSE MARY JANUS, DR. WILFRED REID, MYRNA SALAZAR, DR. LUIS SALCES, and VIOLA THOMAS, Individually and as Officers and Members of the Board of Education of the City of Chicago, Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, and APPENDIX

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QUESTIONS PRESENTED

I. Does a union's "fair-share-fee" notice meet the constitutional standards of *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and support collection of the fee, where the notice

- uses overbroad or otherwise illegal definitions of "collective bargaining";
- employs an economically invalid method of allocating the union's costs between "collective-bargaining" and "non-collective-bargaining' activities;
- incorporates incomplete and misleading auditors' "verifications";
- calculates nonunion employees' "proportionate share" of the union's "collective-bargaining" costs according to an incorrect formula; and
- imposes on nonunion employees the burden to investigate the sources and validity of the financial data and methodology of cost-allocation upon which the notice is based?

The Court of Appeals for the Seventh Circuit held "YES". In accord with at least two other Circuit Courts of Appeals[1] and a State court of last resort,[2] petitioners submit that the answer is "NO".

II. Does *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), require nonunion employees to exhaust the union's procedure for arbitration of the size of the "fair-share

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[1] Tierney v. City of Toledo, 824 F.2d 1497, 1505-06 (6th Cir. 1987); Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 640 (1st Cir. 1990).

[2] Harrison v. Massachusetts Society of Professors, 405 Mass. 56, 62-64, 537 N.E.2d 1237, 1241-42 (1989).

fee" as a precondition to bringing suit under 42 U.S.C. § 1983 in federal court to challenge either the adequacy of the "fair-share-fee" notice or the accuracy of the calculation of the fee set out in that notice?

The Court of Appeals for the Seventh Circuit held "YES". In accord with at least one other Circuit Court of Appeals[3] and a State court of last resort,[4] petitioners submit that the answer is "NO".

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[3] Tierney v. City of Toldeo, 917 F.2d 927, 939-40 (6th Cir. 1990).

[4] Gibney v. Toledo Bd. of Educ., 40 Ohio St. 3d 152, 154-57, 532 N.E.2d 1300, 1303-05 (1988).

PARTIES TO THE PROCEEDING BELOW

The caption of this petition lists all the parties who participated in petitioners' appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of which is sought to be reviewed here.

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TABLE OF ABBREVIATIONS

"AFT"	—	American Federation of Teachers
"App."	—	APPENDIX hereto
"Board"	—	respondent Board of Education of the City of Chicago
"CB"	—	collective bargaining
"CTU"	—	respondent Chicago Teachers Union, Local No. 1
"FSN-1"	—	respondent CTU's 1982-1983 "fair-share-fee" notice
"FSN-2"	—	respondent CTU's 1986-1987 "fair-share-fee" notice
"FSN-3"	—	respondent CTU's 1987-1988 "fair-share-fee" notice
"Hawkins"	—	transcript of the deposition-testimony of David F. Hawkins (31 May 1988)
"IFT"	—	Illinois Federation of Teachers
"McKendree"	—	transcript of the deposition-testimony of Kenneth C. McKendree (1 June 1988)
"Merkel"	—	transcript of the deposition-testimony of Paul A. Merkel (22 April 1988)
"Moloney"	—	transcript of the deposition-testimony of Mark R. Moloney (5 May 1988)
"non-CB"	—	non-collective bargaining

"Peltzman I"	—	transcript of the deposition-testimony of Samuel Peltzman (3 August 1987)
"Peltzman II"	—	transcript of the deposition-testimony of Samuel Peltzman (27 May 1988)
"Vaughn"	—	transcript of the deposition-testimony of Jacqueline B. Vaughn (16 December 1986)

No. _____

IN THE

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OCTOBER TERM, 1990

ANNIE LEE HUDSON, *et al.*,

Petitioners,

v.

CHICAGO TEACHERS UNION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTION

Pursuant to Rules 12, 13, and 14 of the Rules of this Court, ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTERLENE HOLMES, ROSE McCOY, DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD ("the teachers") hereby petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to review that court's judgment of 9 January 1991.

OPINIONS BELOW

The opinion of the Court of Appeals supporting the judgment of 9 January 1991 of which the teachers seek review is reported at 922 F.2d 1306, and is reproduced in the APPENDIX hereto ("App.") at 1a-23a. The opinion of the United States District Court for the Northern District of Illinois of 16 Novem-

ber 1988, which the Court of Appeals affirmed, is reported at 699 F. Supp. 1334, and is reproduced in App. at 24a-39a. An earlier opinion of the District Court, denying class certification in this case, is reported at 117 F.R.D. 413, and is reproduced in App. at 40a-43a.

JURISDICTION

The Court of Appeals entered the judgment of which the teachers seek review on 9 January 1991. This petition is filed within ninety days of that judgment, and is therefore timely under Rule 13.1 of the Rules of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the First and Fourteenth Amendments to the Constitution of the United States and of 42 U.S.C. § 1983 to the "fair-share-fee" section of the Illinois School Code, Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (Smith-Hurd 1987). The text of these provisions is set out in App. at 111a-112a.

STATEMENT OF THE CASE

For the second time,[1] this Court is being asked to establish basic constitutional principles to govern the procedures employed by the Chicago Teachers Union, Local No. 1 ("CTU") for collecting "fair-share fees"[2] under color of Illinois law[3] — and,

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[1] The first case was *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986)("*Hudson*").

[2] A "fair-share fee" is the fee nonunion employees such as the teachers pay CTU to cover their *pro rata* share of the costs of CTU's activities as their exclusive representative for purposes of collective bargaining with the Chicago Board of Education ("Board").

[3] Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (Smith-Hurd 1987). *See* App. at 112a.

by extension, the procedures to be utilized by all public-sector unions throughout the United States in the collection of such fees.

In 1983, the teachers brought this civil-rights action under Title 42, United States Code, Section 1983, to challenge the constitutionality of CTU's continuing implementation of the "fair-share" provisions of successive collective-bargaining agreements between it and the Board. The District Court held the 1982-1983 fee — including the *pre*-collection notice thereto ("FSN-1") — constitutional.[4] The teachers appealed; and the Court of Appeals reversed on the issue of the constitutionality of FSN-1.[5] On CTU's petition for a writ of certiorari, this Court in *Hudson* affirmed the Court of Appeals, setting out the initial guidelines of First-Amendment procedural due process for the collection of "fair-share fees", and remanding for the District Court to "fashio[n] a proper remedy".[6]

On remand, the teachers amended their complaint to focus exclusively on procedural due process.[7] CTU then issued a new 1986-1987 "fair-share" notice ("FSN-2"), the constitutionality of which the teachers attacked. The parties agreed, though, that during the pendency of the proceedings CTU would deposit all "fair-share fees" collected under color of FSN-2 with the Clerk of the District Court. CTU then moved for release of the fees from escrow (in effect, seeking summary judgment) on the ground that FSN-2 was constitutional. However, before the District Court ruled on this motion, CTU issued its 1987-1988 "fair-share" notice ("FSN-3"), and proposed (with the agreement of the other parties and the District Court) that FSN-2 be treated as of no effect, that the court reimburse the teachers their full 1987-1988 fees, and that the parties litigate only the sufficiency

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[4] Hudson v. Chicago Teachers Union, 573 F. Supp. 1505 (N.D. Ill. 1983).

[5] Hudson v. Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984).

[6] 475 U.S. at 306-07, 309 n.22.

[7] *See* App. at 44a-51a.

as a matter of procedural due process of FSN-3, which would serve as CTU's "fair-share-fee" notice permanently thereafter.[8]

To establish the existence of genuine issues of material fact concerning the constitutional inadequacy of FSN-3, the teachers then deposed six witnesses: Jacqueline B. Vaughn, CTU President, and Paul A. Merkel and Mark R. Moloney, the certified public accountants who had prepared and allegedly "verified"[9] FSN-3 on behalf of CTU and its affiliates, the Illinois Federation of Teachers ("IFT") and the American Federation of Teachers ("AFT"); and Kenneth C. McKendree (an accountant), Professor Samuel Peltzman of the University of Chicago (an expert on economic analysis), and Professor David F. Hawkins of the Harvard Graduate School of Business Administration (an expert on accounting-theory), whom the teachers engaged to critique FSN-3.[10] Respondents deposed no witnesses of their own.

CTU then moved a second time for release of the fees held in escrow (again, effectively seeking summary judgment), claiming that FSN-3 met the requirements of *Hudson*. *Notwithstanding the undisputed testimony (recounted below) in the teachers' favor, the District Court granted CTU's motion, and the Court of Appeals affirmed, on the ground that the factual and legal merits of the teachers' challenges to the sufficiency of FSN-3 were irrelevant, because the teachers should first present their arguments to the "impartial decisionmaker" in CTU's own internal arbitration-procedure.*[11] In arriving at this result, the lower courts refused

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[8] FSN-3 appears in App. at 52a-110a.

[9] *See* Hudson, 475 U.S. at 307 n.18.

[10] Hereinafter, the teachers will refer to the testimony of these individuals by using the abbreviations of the transcripts of their depositions set out in the TABLE OF ABBREVIATIONS, *ante*.

[11] App. at 33a (District Court) ("[b]y making these objections in this forum, [the teachers] are simply wasting their breath — and this court's time"), 21a (Court of Appeals) ("[w]e need not pass on th[e] merits [of the teachers' objec-

to conduct a trial or other inquiry to determine whether FSN-3 does in fact fall short of the very standards according to which *Hudson* had earlier found FSN-1 unconstitutional,[12] by failing (as the teachers argued)

- to set out the fee in a factual context conducive to an assessment of its correctness *vel non* ("sufficient information to gauge the propriety of the fee");[13]

- to identify relevant underlying factual data, and to employ a scientifically correct methodology of cost-allocation to calculate the fee ("information about the basis for the proportionate share", "the source of the figure for the agency fee", "the reasons why [nonmember employees] were required to pay");

- to provide constitutional definitions of "collective bargaining" ("CB") for the categorization of union expenditures ("identifying the expenditures for collective bargaining");

- to give a functional breakdown of the union's claimed CB activities, and a relational analysis of the connection between the activities and applicable definitions of CB ("identifying the expenditures for collective bargaining", "includ[ing] major categories of expenses");

- to indicate how allegedly CB activities were properly chargeable to the teachers, in terms of both the characterization of the activities as CB and the evidence of delivery of the services to the teachers' bargaining-unit

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tions] because the proper forum for these objections is before the independent arbitrator, not before this court").

[12] 475 U.S. at 306-07 & n.18. The teachers draw from this passage in *Hudson* the quotations in the text immediately following.

[13] Inasmuch as *Webster's New Twentieth Century Dictionary* (unabrgd. 2d ed.) at 1444 defines "propriety" as "conformity with what is proper", and lists as a synonym "correctness", the teachers argued that to "gauge the propriety of the * * * fee" means to assess its "correctness".

through those activities ("had been provided for the benefit of [those] nonmembers");

- to explain the formula used to calculate the individual nonmember employee's fee ("information about the basis for the proportionate share");

- to contain all the information needed to judge the reasonable correctness of the assessment ("potential objectors [must] be given sufficient information to gauge the propriety of the * * * fee", "requiring them to object in order to receive information [is improper]"); and

- to include a proper certification of accuracy from an outside source ("verification by an independent auditor").

Specifically in support of these contentions, the teachers relied on the uncontested testimony of the deponents in five areas:

◆ **Incorrect definitions of "collective bargaining".** Throughout the litigation, the teachers argued that FSN-3 uses definitions of CB that are overinclusive or patently illegal under the standard set out in *Ellis v. Railway Clerks*.[14] For example, FSN-3 treats as "chargeable" all

> communications with community organizations, civic groups, government agencies and the media respecting the [unions'] position on work related matters * * * .[15]

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[14] 466 U.S. 435, 448 (1984): *viz.*, "whether the * * * expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues". The very definitional matters discussed *post* are now before this Court in *Lehnert v. Ferris Faculty Ass'n-MEA-NEA, cert. granted*, 110 S. Ct. 2616, *argued*, 59 U.S.L.W. 3361 (U.S. 5 Nov. 1990) (No. 89-1217).

[15] App. at 84a.

But, the teachers asserted, although CTU may charge nonunion employees "for reporting to them about those activities it can charge them for doing",[16] it has no duty as their exclusive representative to communicate with outside organizations about even its activities in that capacity, let alone its "position on work related matters". FSN-3 also treats as "chargeable" all "lobbying and legislative activities with respect to matters concerning employees' work related issues".[17] But, the teachers contended, although a public-sector union may engage in lobbying that is "an integral part of the bargaining process", CTU concedes that no public officials other than the Board participate in bargaining with it.[18] Again, FSN-3 deems "chargeable" "maintaining [union] membership and recruitment of [Board] employees".[19] However, the teachers complained, such "organizing" activities are not "chargeable" at all.[20] Finally, the IFT and AFT portions of FSN-3 treat *all* of those unions' allegedly CB activities as "chargeable" to CTU, even though IFT and AFT perform most of their activities for *other* local affiliates.[21]

Against the background of these arguments, McKendree explained that, in any audit performed to "verify" FSN-3, the definitions of the activities that supposedly constitute CB are "quite important to the numbers" ultimately claimed as CB costs. Moreover, if the auditor is unaware that the definitions are

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[16] Ellis, 466 U.S. at 451.

[17] App. at 84a.

[18] *Contrast* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977), *with* Vaughn at 79-80.

[19] App. at 84a.

[20] Ellis, 466 U.S. at 451-53.

[21] *See* Merkel at 154, 163-64, 167-68. One particularly glaring example in this area is the 100% allocation of AFT's "higher-education" activities as "chargeable" to CTU, which has nothing to do with "higher education". *See* Moloney at 30, 43. Another example is the 100% allocation of AFT's "defense fund" (legal assistance), which directly contravenes *Ellis*. *Contrast* App. at 93a *with* 466 U.S. at 453.

wrong, he can inadvertently give an unqualified opinion (*i.e.*, "verification" of the CB expenses) that reflects *erroneous* CB costs.[22] All the accountants agreed that

- the unions, not the auditors, are responsible for providing correct CB definitions;
- there are, as yet, no generally accepted accounting standards as to CB costs;
- the unions unilaterally generated the CB definitions FSN-3 uses;
- the unions' auditors performed little or no independent review of the CB definitions; and
- the only statement of those definitions, or of any rationale for them, appears in FSN-3.[23]

And, reviewing all the accountants' testimony, Hawkins condemned as "a heads in the sand approach" the "verification" Merkel and Moloney employed: *viz.*, applying to various union activities the CB definitions the unions provided, agreeing that the activities met the definitions, and then characterizing the activities as "CB" accordingly.

♦ **Incorrect methodology for ascertaining costs.** Peltzman explained that, besides proper CB definitions, a "fair-share" notice must rest on a scientifically correct method for allocating the unions' costs to CB and non-CB activities.[24] The accountants testified that providing financial data through such a method is the unions' responsibility; for auditors can give unqualified opinions even if (unknown to them) the data derive from an improper scheme of allocation.[25] CTU, IFT, and AFT deter-

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[22] McKendree at 13, 25-28, 30-31.

[23] McKendree at 13-14; Moloney at 53-59, 61-66; Merkel at 36-40.

[24] Peltzman II, at 91-93.

[25] McKendree at 17-19, 28-29.

mined the cost-allocation methodology and supplied the data for FSN-3; the auditors merely reviewed what the unions presented them.[26]

According to Peltzman, FSN-3 employs a completely incorrect method for allocating the costs a multipurpose labor organization incurs on CB and non-CB activities.[27] As Peltzman pointed out, "there would be very broad agreement [among economists]" that another method "would be the correct way" to allocate CB and non-CB costs.[28]

♦ **Inadequate auditors' "verifications".** Given that the accounting profession has yet to develop standards on the issue of allocating CB and non-CB costs,[29] Hawkins testified that it is not enough for an auditor's "verification" of FSN-3 to take the form of an "examination": "[Y]ou just don't limit yourself to the

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[26] Moloney at 51-52.

[27] Peltzman II, at 16 ("methods used [in FSN-3] • • • ignore completely the economic issues [involved in such an allocation]"), 27 ("the way in which [the allocation] was done has no resemblance at all to the way that it ought to be done"), 44 ("an [economically] incorrect methodology"), 69 ("cost allocation [in FSN-3] • • • is done on a different basis than • • • the correct one"), 97 (FSN-3 "ignored sound economic principles"). This conclusion does not depend on the particular "level of service" the unions' accountants provided in "verifying" FSN-3. *Id.* at 146-48.

[28] *Id.* at 25 (greater than 95% agreement). The alternative method, described in great detail in Professor Peltzman's testimony, is employed by economists and regulatory agencies "all the time" and "as a routine matter". Peltzman I, at 37-41, 62-63, 85-86; Peltzman II, at 35-43.

The teachers do not seek, in this petition, this Court's determination of which method of cost-allocation should be applied to the problem of separating CTU's CB from non-CB costs. Rather, that question should be addressed in the first instance by the District Court. The issue here is that both the District Court and the Court of Appeals refused to deal at all with the teachers' contention that, with respect to cost-allocation, FSN-3 is scientifically incompetent.

[29] McKendree at 46.

auditor's opinion. You also look at the entire union disclosure."[30] However, FSN-3 provides minimal disclosure, because it

- sets out no rationale for the material factors and assumptions the unions chose and on which the auditors relied;
- misleads lay readers into assuming that the unions' CB definitions are actually "the auditor's opinion with respect to acceptable definitions";
- confuses laymen as to "which portion of [the notice] is [the unions'] representation and which part is the auditor's responsibility";
- lacks explanations, in laymen's terms, of the financial data with which the auditors dealt, of how the auditors "verified" the data, and of what they did not "verify"; and
- lacks detailed schedules breaking down activities and costs, particularly at the level of CTU.[31]

According to Hawkins, FSN-3 does not meet a proper "verification" standard:

> [T]he primary deficiency in the [CTU and IFT portions of FSN-3] * * * lies in the heavy reliance on management representations in respect to what is [CB or non-CB] in the salary areas of officers and field staff. Also, in the lack of verification in the content of individuals' activities * * * verification requires the auditor to, in fact, verify, and that's what is missing. * * * [The] principle concern with respect to AFT verification is again in the area of employee salaries * * * where there seems to be excessive reliance on the time

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[30] Hawkins at 109-11, 28. It is the unions' "responsibility to present the information". McKendree at 20-22.

[31] McKendree at 21-22; Hawkins at 89-91, 68-69, 141-44, 72-79.

> record keeping system * * * where there was rather limited attesting of employees' understanding of that system and over reliance on the attesting of the allocations against employee job descriptions and the mathematical accuracy of the computations made by the AFT staff who took the basic data and computed the allocation.[32]

In line with these concerns, the testimony of the unions' own accountants showed that:

- so-called "time" records were largely based on activity, not time, reports;
- union employees maintained these records in idiosyncratic fashion;
- the accuracy of the employees' recordation of their activities was subject to no or minimal checks;
- activities identified in the reports were already assigned to the categories CB or non-CB when the auditors received the documents; and
- allocations were based on the employees' own judgments as to what they had done, which the auditors accepted without significant inquiry.[33]

◆ **Incorrect formula for determining the teachers' share of CTU's CB costs.** The distribution of CB costs among union and nonunion teachers is an issue separate from the determination of those costs. The formula used in FSN-3 (a percentage of union dues) assumes, without proof, a proportionality of costs in servicing all teachers, and thereby embodies a systematic bias

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[32] Hawkins at 63-66, 71-72. Around 50-60% of the unions' alleged CB costs were contingent on the allocation of salaries. McKendree at 11-12.

[33] Merkel at 46-47, 51-52, 56-58, 60, 69-72, 87, 96-99, 101-02, 145-47, 184-90; Moloney at 21-30.

against nonunion employees that imposes on them a fee larger than logically warranted.[34]

◆ **Burden on the teachers to investigate.** Most of the information necessary to understand how FSN-3 was prepared and what it shows (or fails to show) does not appear in the notice itself, and may not even be accessible to nonunion employees absent legal process.[35] Even where such information is available through CTU or its auditors, inquiry by nonunion teachers constitutes a heavy practical burden.[36]

Notwithstanding this undisputed testimony in the teachers' favor, the District Court granted CTU's motion to release the fees from escrow, in effect entering summary judgment for respondents on the issue of whether FSN-3 is constitutionally valid under *Hudson*. Acknowledging the teachers' criticisms of FSN-3 for relying on incorrect definitions of CB, employing an economically faulty method of cost-allocation, and using the wrong formula for setting the nonmembers' "proportionate share", the court nevertheless held that,

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[34] Peltzman I, at 66-70, 134-35; Peltzman II, at 27-35, 86-92, 119-20.

I.e., if **CB** = *cost of collective bargaining in the unit*
NCB = *all non-CB costs in the unit*
M = *number of union members in the unit*
N = *number of nonunion employees in the unit,*
then the true "fair-share fee" is definable as:

FS = CB/(M+N).

The formula used in FSN-3, which calculates the "fair-share fee" as a percentage of union dues, **D**, is definable as:

FD = (D)(CB)/(CB+NCB).

However, **FD = FS** *if and only if* **D = (CB+NCB)/(M+N).**

If **D = (CB+NCB)/M,** *then* **FD>FS** in direct proportion to the magnitude of **N**, because:

FS = CB/(M+N) *whereas* **FD = CB/M.**

[35] Merkel at 27-29; Moloney at 14-17.

[36] Hawkins at 116-17.

> [e]ven assuming the validity of these arguments, [the teachers'] objections to the calculation of the fee have little if any relevance to the issue that now confronts this court: Is [FSN-3] constitutionally sufficient * * * ? *If anything, [the teachers'] specific attacks on the derivation of the fee suggest that [FSN-3] is performing its proper constitutional function — providing potential objectors with "sufficient information to gauge the propriety of the union's fee." * * * After all, [the teachers] could not possibly have raised such detailed objections to the fee if [FSN-3] continued to "[l]eav[e] the nonunion employees in the dark about the source of the figure for the agency fee." * * **
>
> [The teachers] argue that [FSN-3] cannot survive constitutional scrutiny unless the notice incorporates legally correct definitions of collective bargaining and an economically sound methodology for calculating the fair share fee. *This argument mistakenly equates the adequacy of the notice with the accuracy of the fee assessment.* * * * [E]xtensive judicial intervention in the initial calculation of the agency fee would effectively eliminate the need for *Hudson*'s impartial decisionmaker. *Having required the CTU to establish its own objection procedure, the* Hudson *Court could not have intended for the federal judiciary to supersede the internal union procedure for resolving fee disputes.* * * *
>
> * * * [T]he court finds [the teachers'] objections to the fee's derivation largely irrelevant. By making these objections in this forum, [the teachers] are simply wasting their breath — and this court's time.[37]

The teachers appealed; but the Court of Appeals affirmed. The court correctly noted the teachers'

> claim that the CTU has based its fee calculation on an incorrect definition of collective bargaining services, identi-

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[37] App. at 30a-33a (emphasis supplied).

> fied categorical expenses too broadly, relied on an economically "invalid" method for allocating costs between chargeable and non-chargeable categories, allocated as chargeable costs activities which do not benefit teachers, employed "incomplete, insufficient, and misleading" accounting verifications, and used incorrect formulas in calculating allocable costs for collective bargaining.

But the teachers' "challenge", the court contended, "asserts that a prior hearing and prior judicial determination of the correctness of a fair share fee is a precondition to the collection of the fee". And this, the court opined,

> "mistakenly equates the adequacy of the notice with the accuracy of the fee assessment," * * * and thus squarely contradicts *Hudson*'s holding and rationale. * * * *Hudson* did not contemplate that federal courts would be required, on the basis of the notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected. * * * The Supreme Court's prerequisites presuppose that a fee has already been collected and that the challenge will be decided after the fee has been collected. The federal court does not, at this stage, review the fee calculation. * * * Of course, the impartial decisionmaker's determination [under CTU's internal procedure] is not the final word on the challenge. *If* the decision is adverse to the [the teachers] they may *subsequently* seek review by a federal court. * * *
>
> The singular role of the federal courts in reviewing the adequacy of a fair share notice is to determine whether the notice gives the nonunion members enough information to challenge the basis for the fee.[38]

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[38] *Id.* at 15a-17a (emphasis in original).

Reaffirming its own earlier decisions in *Ping*[39] and *Gilpin*[40], the court ruled that, although a "fair-share-fee" notice must disclose "*sufficient* information to permit non-members to make an *informed* decision about whether to object to the *amount* of the * * * fee", nevertheless the notice need *not* "explain the *principles* under which chargeable expenses were allocated" but could merely "indicate which activities were wholly or partly pursuant to collective bargaining activities and what percentage of each expenditure is allocated for such".[41]

After recounting the information contained in FSN-3, the court held the latter

> in accordance with our prior precedents because it provides sufficient information to enable [the teachers] "to decide whether there is any reason to mount a challenge." * * * [The teachers] have advanced a plethora of objections to the CTU's methods for calculating the fair share fee amount. ***We need not pass on their merits because the proper forum for these objections is before the independent arbitrator [in CTU's internal procedure], not before this court.***[42]

The teachers now seek this Court's review.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Rule 10.1(a) and (c) of the Rules of this Court warrants a writ of certiorari because the Court of Appeals has erroneously held that:

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[39] Ping v. National Educ. Ass'n, 870 F.2d 1369 (7th Cir. 1989).

[40] Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir.), *cert. denied*, 110 S. Ct. 278 (1989).

[41] App. at 17a-18a (emphasis supplied).

[42] *Id.* at 21a (emphasis supplied).

◆ FSN-3 is constitutionally adequate notwithstanding its lack of appropriate explanations of and information supporting the calculation of the fee — which holding squarely conflicts with this Court's decision in *Hudson* and with the decisions of other Courts of Appeals[43] and a State court of last resort[44] applying *Hudson*; and

◆ CTU's promulgation of a "fair-share-fee" notice lacking even theoretical accuracy nevertheless compels the teachers to exhaust CTU's internal arbitration-procedure before seeking federal-court review of the propriety of the notice — which holding wrongly decides an important question of federal law left unsettled in *Hudson* and on which another Court of Appeals[45] and a State court of last resort[46] have reached contrary decisions.

I. The Court of Appeals has erroneously held that a "fair-share-fee" notice need not be even theoretically accurate to be constitutionally adequate, in direct contradiction of *Hudson* and other appellate courts.

Both the Court of Appeals and the District Court presumed the teachers' criticisms of FSN-3 valid, but held that, notwithstanding, the teachers "ma[de] their objections in th[e wrong] forum" and that federal courts "need not pass on th[e] merits [of

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[43] Tierney v. City of Toledo, 824 F.2d 1497, 1505-06 (6th Cir. 1987) (procedure "constitutionally deficient under *Hudson*" because union's "formulations" of CB costs invalid); Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 640 (1st Cir. 1990) (unified Bar's *Hudson*-type procedure unconstitutional because "[i]t defines too broadly the range of activities that may be funded with compulsory dues").

[44] Harrison v. Massachusetts Society of Professors, 405 Mass. 56, 62, 64, 537 N.E.2d 1237, 1241, 1242 (1989) (to be "adequate", "explanation" and "information" must be "contemporaneous with a union's agency fee demand").

[45] Tierney v. City of Toledo, 917 F.2d 927, 939-40 (6th Cir. 1990).

[46] Gibney v. Toledo Bd. of Educ., 40 Ohio St. 3d 152, 154-57, 532 N.E.2d 1300, 1303-05 (1988).

those criticisms]" until the teachers have first pressed their "objections * * * before the independent arbitrator".[47] Thus, the lower courts have erroneously held FSN-3 constitutionally adequate even if (as the teachers' evidence showed) it is wildly inaccurate because *inter alia* it

- employs legally incorrect definitions of CB;
- relies on an economically erroneous method for allocations of costs;
- supplies incompetent auditors' "verifications"; and
- calculates nonmember-employees' "proportionate share" of CB costs according to the wrong formula.

That is, the lower courts have erroneously held the constitutionality of FSN-3 — and, therefore, CTU's privilege to collect "fair-share fees" in the first instance[48]— independent of the extent and seriousness of the legal, economic, accounting, and mathematical errors FSN-3 contains. Indeed, according to the District Court's blatant apology that the notice "is performing its proper constitutional function" the *more* it provides nonunion employees with reasons for "specific attacks on the derivation of the fee", *the notice's* ***constitutionality*** *is directly proportional to the level of perceived and grave* ***errors*** *it contains* — which amounts to a heretofore unheard-of "*ir*rational-basis test" of constitutionality![49]

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[47] App. at 33a (District Court), 21a (Court of Appeals).

[48] *See* Hudson, 475 U.S. at 310 (emphasis supplied): "constitutional requirements for the Union's *collection* of agency fees include an adequate explanation of the basis for the fee".

[49] App. at 31a. The Court of Appeals concurred that a notice suffices if it "gives the nonunion members enough information to challenge the basis for the fee". *Id.* at 17a. Obviously, the more patently and egregiously erroneous a notice is, the more it satisfies this test. At the logical extreme, a notice containing *no* information (other than the mere amount of the fee) would approach perfection, because *every* aspect of the "basis", "propriety", and "source" of the

Even in the absence of *Hudson*, the teachers would be entitled on at least two fundamental constitutional grounds sounding in procedural due process to prove that FSN-3 is complexly nonrational. *First*, as the undeniable product of "state action", FSN-3 is assimilable to a State statute for purposes of constitutional analysis under 42 U.S.C. § 1983. And it denies the first principle of due process to preclude "the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving [the teachers] of * * * property had a rational basis".[50] *Second*, CTU's responsibility to provide a constitutionally adequate "fair-share-fee" notice is, not only a command of the First Amendment, but also an aspect of its "duty of fair representation" as the teachers' exclusive representative for purposes of collective bargaining with the Board.[51] The "duty of fair representation", though, is simply a judicially created proxy for the procedural due process the Constitution implicitly requires a union to afford the nonunion employees it represents, if exclusive representation is to be enforceable against them.[52] And the courts always retain the power and duty to investigate whether a union's action *qua* representative is "so far outside a 'wide range of reasonableness' * * * that it is wholly 'irrational' or 'arbitrary'".[53]

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fee would be open to challenge! *Contrast* Hudson, 475 U.S. at 306-07.

[50] United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). And this "rational-basis" standard of review, although less-rigorous than the standard applied under the First Amendment, is still "not a toothless one". Mathews v. De Castro, 429 U.S. 181, 185 (1976).

[51] *See* Communications Workers v. Beck, 487 U.S. 735, 742-44 (1988) ("agency shop" under the National Labor Relations Act).

[52] *Compare* Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944) (Railway Labor Act) (union required "to give [nonunion employees] notice of and opportunity for hearing upon its proposed actions"), *with* Comment, "Union Obligations to Disclose Information Under the Duty of Fair Representation: A Survey", 25 *Duq. L. Rev.* 959, 967-70 (1987).

[53] Air Line Pilots Ass'n v. O'Neill, __ U.S. __, __, 59 U.S.L.W. 4175, 4179 (19 March 1991).

Moreover, to attribute an "*ir*rational-basis test" of constitutionality to *Hudson* (as the lower courts do[54]) maligns as operationally absurd the First-Amendment procedural due process *Hudson* crafted for "fair-share-fee" cases. *Hudson* draws no illogical distinction between what the lower courts described as "the adequacy of the notice"— *i.e.*, the satisfaction of certain merely *formal* requirements[55]— and "the accuracy of the fee assessment"— *i.e.*, the provision of *substantively* correct information. Rather, *Hudson* mandates that the notice "provid[e] nonmembers with [a]dequate information *about the basis for the proportionate share*", "giv[e] sufficient information *to gauge the propriety of the union's fee*", supply "adequate disclosure *of the reasons why* [the teachers] were required to pay", and not "[l]eav[e them] in the dark *about the source of the figure for the * * * fee*".[56] And the terms "basis", "propriety", "reasons why", and "source" literally imply *derivation* and *calculation* of the fee.[57]

The lower courts' disjunction between "adequacy" and "accuracy" mistakenly assumes either that FSN-3 need contain *no* information relating to CTU's method of calculating the fee,[58] or that (as here) a redundantly *incorrect* formula may constitute the "sufficient information" *Hudson* requires.[59] *Hudson*, however, has already rejected these two alternatives, in striking down FSN-1. FSN-1 calculated the 1982-1983 fee by subtracting admittedly political expenditures from the unions' institutional

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[54] App. at 15a-16a (Court of Appeals), 31a-32a (District Court).

[55] *E.g.*, identification of activities the union claims as CB in nature and "what percentage of each expenditure is allocated for such". *Id.* at 18a.

[56] 475 U.S. at 306-07 (footnotes omitted; emphasis supplied).

[57] *See* Grunwald v. San Bernadino City School Dist., 917 F.2d 1223, 1227 (9th Cir. 1990) (reading *Hudson* to say that "plan must * * * provide nonmembers adequate information of the basis for the calculation of the * * * fee").

[58] *See* App. at 18a (notice need "not explain *the principle* under which chargeable expenses were allocated to the fee") (emphasis supplied).

[59] *Id.* at 21a (federal courts "need not pass on th[e] merits" of the teachers' "plethora of objections to the CTU's methods").

costs, and conclusively presuming that the remainder (the "*residuum*") equalled their chargeable CB costs. The "*residuum* theory" implicitly defined CB costs (*i.e.*, institutional expenditures *minus* political spending). It was a cost-allocation method. And it disclosed the categories of the unions' allegedly chargeable expenditures (*i.e.*, every line-item in their budgets, save political expenditures). Of course, the definitions, the method, and the disclosure were improper. But, by the lower courts' reasoning, *Hudson* should have disallowed the teachers' attack on the "*residuum* theory" as "mistakenly equat[ing] the adequacy of the notice with the accuracy of the fee assessment". *Yet* Hudson *struck down the* "residuum *theory" precisely because it was "not an adequate disclosure of the reasons why [the teachers] were required to pay".*[60] Thus, *Hudson* holds that an *incorrect* formula for calculating the fee — one that relies on improper definitions of CB, employs faulty cost-allocation methodology, and conceals rather than discloses necessary "reasons" — provides "*in*adequate information about the basis for the [fee]" *at the notice level.*[61]

The lower courts' complaint that the teachers' evidence on CTU's improper CB definitions and incompetent method of cost-allocation (among other demerits) goes prematurely to the "calculation" of the fee[62] is nonsensical: *Every single element* in FSN-3 goes to the "calculation" of the fee, the very purpose of the notice being to explain the "source", "basis", and "propriety" of the final figure[63] in terms of the relevant supporting financial evidence and analysis, so as to give nonunion employees some meaningful measure of *reliability* as to the theoretical accuracy of

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[60] 475 U.S. 307 (footnote omitted; emphasis supplied).

[61] *Id.* at 306. *Accord,* Tierney v. City of Toledo, 824 F.2d 1497, 1505-06 (6th Cir. 1987). *See also* Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 640 (1st Cir. 1990).

[62] App. at 15a, 16a, 31a, 32a, 33a.

[63] *See* Hudson, 475 U.S. at 307 n.18 (CTU "cannot be faulted for *calculating* its fee on the basis of * * * ") (emphasis supplied).

the union's method of arriving at the fee.[64] The real question — which those courts ignore — is: "May CTU calculate its fee *in the notice* (and thereby rationalize collection of that fee) on the basis of improper definitions of CB and an economically faulty method of cost-allocation that would not support its retention of the fee after a hearing before a court?"

The lower courts' further observation that FSN-3 "is performing its proper constitutional function" because "the teachers could not possibly have raised such detailed objections * * * if the * * * scheme continued to '[l]eav[e] the nonunion employees in the dark about the source of the figure for the agency fee'"[65] is doubly deficient. *First*, it forgets that most of the teachers' "detailed objections" derive from extensive *federal-court discovery — not* from "sufficient" (or even any) information in FSN-3. Far from intimating that the teachers' discovery will rehabilitate a defective notice, *Hudson* holds that a constitutional notice does *not* "requir[e nonunion employees] to object in order to receive information".[66] Under the lower courts' illogical approach, conversely, that the teachers have themselves exposed the *in*adequacy of FSN-3 reflexively *validates* it, compelling them *further* to object in CTU's internal appeal-process.[67] *Second*, the lower courts stand *Hudson* upside-down. The *more* inadequate a notice — that is, the *more illegal* the unions' definitions of CB, the *more unscientific* their method of cost-allocation, and the *more confusing* their accountants' "verifications" — the *better*,

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[64] *Compare id.* at 304 n.13 ("procedures required by the First Amendment also provide the protections [of traditional procedural due process] for any deprivation of property") *with* Brock v. Roadway Express, Inc., 481 U.S. 252, 262-65 (1987) (procedures must "establish a reliable 'initial check against mistaken decisions'" by supplying "notice of the relevant supporting evidence", so as to "satisfy the due process requirements for reliability").

[65] App. at 31a (District Court); *see id.* at 21a (Court of Appeals).

[66] 475 U.S. at 306.

[67] This procedure appears in App. at 100a-110a.

because such gross demerits enable "potential objectors" to develop criticisms to bring before the "impartial decisionmaker".

Pace the lower courts, *Hudson* designed the *post*-notice hearing, not to substitute for a legally and scientifically incompetent notice, but instead to resolve honest disputes about the application to specific union expenditures of a valid analysis in the notice. The *post*-notice hearing addresses "amounts [of the fee] *reasonably* in dispute",[68] thus presuming that CTU's rationale for the fee — as to definitions of CB, methodology of cost-allocation, accountants' "verifications", and so on — are, in fact and law, *reasonable*. But if (as here) CTU claims a fee on the basis of a complexly invalid methodology underlying the notice, *NO post*-notice hearing can be required. *CTU may not rely on an unreasonable notice to put fees "reasonably in dispute".*[69]

The lower courts' attempt to absolve themselves of responsibility by complaining that federal courts should not have "to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected"[70] also fails, for three reasons. *First*, it asks the wrong question, which is not whether "*every* element of the fee calculation" should be scrutinized, but instead whether those fundamental demerits going to the core of FSN-3's purpose and vitiating its function must be purged before it can support even collection and escrowing, let alone release to CTU, of the teachers' monies.

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[68] Hudson, 475 U.S. at 310 (emphasis supplied).

[69] This does not "render redundant and irrelevant the requirement[ ] that an impartial decisionmaker hear the dispute", as the Court of Appeals pretends. App. at 16a. For application of even a legally and scientifically proper methodology would still require the union to make disputable judgments in "grey" areas that nonunion employees might challenge before the "impartial decisionmaker" or in court. If the methodology were correct, however, uncertainty would reduce to and focus on these judgments only, rather than the entirety of the notice, as is the case where (as here) the methodology is redundantly and irreparably flawed.

[70] App. at 16a (Court of Appeals). *See id.* at 32a (District Court).

Second, it illegally licenses CTU to circumvent *Hudson*'s *pre*-collection, *pre*-objection procedural safeguards by issuing a purported "notice" that apes the *form*, but lacks the informational *substance*, *Hudson* demands.

And third, it inappropriately and impractically assigns to the "impartial decisionmaker" the task of initially addressing such controlling legal-*cum*-factual issues as the proper definitions of CB and the economically correct method of allocating costs between CB and non-CB. This defeats the goal of *Hudson* that the notice *minimize* the impingement of the "agency shop" on the teachers' First-Amendment rights.[71] For example, the teachers need not accept CTU's unilateral definitions of CB. CTU's accountants lack expertise or authority to make these legal determinations.[72] And legal rulings of the "impartial decisionmaker" lack finality.[73] Which means that, under the lower courts' approach, the teachers can receive a definitive ruling on the CB definitions FSN-3 employs only by bringing a *second* federal civil-rights action *after* they have futilely exhausted CTU's *nonbinding* internal appeal-process.[74] Self-evidently, this *maximizes* the impingement on the teachers' First-Amendment rights. And certainly the mere availability of review of CTU's CB definitions in a *second* court case sometime in the future cannot legitimate either the absence of correct definitions in FSN-3, or the refusal of the lower courts to decide that legal question, now.[75]

Similarly, the courts' refusal to tackle the fundamental issue of cost-allocation methodology finds no support in *Hudson*.

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[71] 475 U.S. at 302-03 & n.11.

[72] Ping, 870 F.2d at 1374. Of course, the accountants may not simply function as ventriloquists' dummies for CTU. *See* McKendree at 23-25.

[73] Hudson, 475 U.S. at 308 n.12; Ping, 870 F.2d at 1373.

[74] App. at 17a (Court of Appeals), 33a (District Court).

[75] *See* Hudson, 475 U.S. at 307 n.20 (eventual availability of "ordinary judicial remedies" does not obviate constitutional problem in defective notice).

Hudson did not shrink from squarely condemning the incompetence of CTU's "*residuum* theory" in FSN-1.[76] So, the methodological question is *not* foreign to federal judicial investigation of the adequacy of a "fair-share-fee" notice in the first instance. Moreover, *Hudson* plainly holds that "the constitutional requirements for [CTU's] *collection* of agency fees include an *adequate explanation* of the basis for the fee" *in the notice*.[77] A nonexistent, or a patently unscientific, explanation cannot be "adequate", by definition. At this juncture, Professor Peltzman's *unchallenged* testimony establishes at least a genuine dispute of material fact as to the inadequacy of the "explanation" of the unions' cost-allocations in FSN-3.[78] Therefore, on this ground alone, the lower courts' effective grant of summary judgment on FSN-3 in CTU's favor cannot stand.[79] Finally, by refusing to address the issue of cost-allocation, the lower courts have improperly "requir[ed the teachers] to object in order to receive [economically valid] information".[80]

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[76] *Id.* at 306-07.

[77] *Id.* at 310 (emphasis supplied).

[78] *Ante*, pp. 8-9.

[79] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52, 255 (1986).

[80] Hudson, 475 U.S. at 306. Precisely because FSN-3 rests on an economically incorrect method of cost-allocation, the figure it gives for the fee can be accurate *only by accident* — and, therefore, the teachers *must* demand more information if they are intelligently to "gauge [the fee's] propriety". *See* Harrison v. Massachusetts Society of Professors, 405 Mass. 56, 62, 64, 537 N.E.2d 1237, 1241, 1242 (1989) (to be "adequate", "explanation" and "information" must be "contemporaneous with a union's agency fee demand"). To be sure, the teachers can conclude with moral certainty that the fee is excessive. Hawkins at 158-59. But that FSN-3 is *surely wrong* counsels its invalidation *ab initio*, not acceptance of it as properly triggering a legitimate "dispute" for the "impartial decisionmaker".

II. The Court of Appeals has erroneously held that nonunion employees must exhaust a union's internal appeal-process before a federal court will address the propriety of the methods by which the union determined the "fair-share fee" in the notice, a requirement that *Hudson* did not establish and does not warrant.

Although exhaustion of state judicial and administrative remedies is no prerequisite to suit in federal court under 42 U.S.C. § 1983,[81] the lower courts nevertheless have gratuitously engrafted onto *Hudson* a requirement that the teachers exhaust CTU's internal appeal-process before a federal court in a civil-rights action will pass on the issue of whether FSN-3 satisfies the Constitution.[82] Neither did *Hudson* so rule; nor does a fair reading of *Hudson* so suggest — as other courts have recognized.[83] Moreover, *even CTU's own procedures for contesting the fee do not purport to make its internal appeal-process either exclusive or preconditional to other administrative or judicial remedies.*[84]

A. Exhaustion would be unwarranted even if the lower courts were correct in saying that the teachers are attempting to litigate the "accuracy" of the fee, rather than the "adequacy" of the notice. For, although both *Allen*[85] and *Abood*[86] "suggested" in *dicta* that the parties there might *voluntarily* use *intra-*

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[81] Patsy v. Board of Regents, 457 U.S. 496, 516 (1982), *followed in a non-*Hudson *context in* Allegheny Corp. v. Haase, 896 F.2d 1046, 1050 (7th Cir. 1990). *Accord*, Felder v. Casey, 487 U.S. 131, 147-50 (1988).

[82] App. at 21a (Court of Appeals), 33a (District Court).

[83] *See* Tierney v. City of Toledo, 917 F.2d 927, 939-40 (6th Cir. 1990); Gibney v. Toledo Bd. of Educ., 40 Ohio St. 3d 152, 154-57, 532 N.E.2d 1300, 1303-05 (1988).

[84] App. at 60a-61a.

[85] Railway Clerks v. Allen, 373 U.S. 113, 122-24 (1963).

[86] Abood v. Detroit Bd. of Educ., 431 U.S. 242 (1977).

union remedies to settle disputes over the size of "agency fees",[87] both cases held that, on remand, the nonmember employees were entitled to *judicial* relief.[88] And nothing in *Hudson* overrules or qualifies these decisions.[89]

B. Unless the constitutional "adequacy" of the notice has *nothing whatsoever* to do with even the theoretical "accuracy" of the fee the notice recites (the impossibility of which the teachers have explained *ante*), exhaustion cannot address the issue the teachers raise that *CTU may collect NO fee without FIRST promulgating a legally valid and scientifically rational notice*. For even if he determines the fee excessive because CTU's CB definitions are wrong, its methodology of cost-allocation improper, and so on, the "impartial decisionmaker" *will not strike or require reformation of the notice, but will merely reduce the fee*. The *notice* will still be *invalid*, but nevertheless will have been *enforced*.[90] And the union will therefore have been effectively licensed to violate *Hudson* by collecting a fee *without first supplying "an adequate explanation of the basis for [it]"*.[91] That is, *if* Hudson *requires exhaustion in cases in which the gross "inaccuracy" of the notice in theory proves its constitutional "inadequacy", then* Hudson's *notice-requirement is effectively meaningless,* as any union can jury-rig a "notice" to mimic a deceitfully acceptable *form* if it need not worry about any adverse legal consequence flowing from the "notice's" defective *substance*.

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[87] *See* Hudson, 475 U.S. at 307 n.19.

[88] Allen, 373 U.S. at 121-22; Abood, 431 U.S. at 239-42.

[89] To the contrary: Far from dogmatically mandating exhaustion, *Hudson* says only that "an expeditious arbitration *might* satisfy the requirement of * * * an impartial decisionmaker". 475 U.S. at 308 n.21 (emphasis supplied).

[90] This alone establishes the illegality of the lower courts' exhaustion-requirement, as even a union member need not exhaust internal union procedures where they "would be inadequate * * * to afford him the full relief he seeks". Clayton v. Auto Workers, 451 U.S. 679, 689 (1981).

[91] Hudson, 475 U.S. at 310 (emphasis supplied).

C. As a practical matter also, exhaustion is redundant, wasteful, time-consuming, and ultimately futile — because the "impartial decisionmaker's" "decision would not receive preclusive effect in any subsequent § 1983 action" in any event.[92]

D. That *Hudson* requires the Board and CTU to provide the teachers an "*opportunity* to challenge the amount of the fee before an impartial decisionmaker"[93] does not compel the teachers to avail themselves of this opportunity. The Board and CTU "have a responsibility to provide procedures that minimize th[e] impingement [of the 'agency shop' on the teachers' First-Amendment rights] and that facilitate [their] ability to protect [their] rights".[94] But the teachers have no duty to utilize these procedures if they conclude that the procedures in fact *maximize* the impingement, *impede* their ability to protect their rights, and *are irrelevant* to the issues they raise — all of which is true both here and in any dispute arising at the "notice"-level of a "fair-share-fee" scheme.

Moreover, as noted above, the "opportunity to challenge the amount of the fee" addresses the issue of how large numerically the fee should be, not the separate, preliminary question of the definitional and methodological inadequacy of the notice. An exhaustion-requirement simply affords the teachers the dubious "opportunity" ***themselves*** *to amend the notice in the course of litigating before the "impartial decisionmaker" the amount of the fee, by forcing the union to adopt legal definitions of CB, to employ economically valid methods of cost-accounting, and so on.* *Hudson* cannot be twisted to impose on the originally prevailing parties a burden to correct CTU's defective notice *ex post* and

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[92] *Id.* at 308 n.21. *See also* Monaghan, "First Amendment 'Due Process'", 83 *Harv. L. Rev.* 518, 520-26 (1970), *cited in* Hudson, 475 U.S. at 303 n.12. Even a union member is excused from exhaustion of internal union procedures where "exhaustion * * * would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim". Clayton, 451 U.S. at 689.

[93] Hudson, 475 U.S. at 310 (emphasis supplied).

[94] *Id.* at 307 n.20.

thereby render it constitutionally valid *nunc pro tunc* to their own detriment!

E. The Court of Appeals' thesis that exhaustion should be imposed because an initial judicial determination of the impropriety of the notice "would in effect render redundant and irrelevant the requirement[ ] that an impartial decisionmaker hear the dispute"[95] is balderdash. The "impartial decisionmaker" *never* hears a dispute over the constitutional inadequacy *of the notice*, by hypothesis — because a "dispute" within the ken of the "impartial decisionmaker" never arises unless the union has collected a fee; and the union has no constitutional right to collect a fee unless the *pre*-collection notice is substantively valid *ex ante*.

F. Finally, as Mr. Justice White's concurring opinion in *Hudson* shows, the *Hudson* majority deliberately chose *not* to adopt Justice White's thesis that, "if the union provides for arbitration *and complies with the other requirements specified in our opinion*, it should be entitled to insist that the arbitration procedure be exhausted before [nonunion employees] resor[t] to the courts".[96] Thus, the question of exhaustion under *any* circumstances in a "fair-share-fee" case remains open in this Court, and the subject of controversy in the Courts of Appeals.[97]

But even under Justice White's view, exhaustion cannot be appropriate here, because the teachers' principal claim is that FSN-3 does *not* "comply with the other requirements specified in [*Hudson*]" — to wit, "an adequate explanation of the basis for the fee".[98]

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[95] App. at 16a.

[96] 475 U.S. at 311 (emphasis supplied).

[97] *Contrast* App. at 21a *with* Tierney, 917 F.2d at 939-40.

[98] 475 U.S. at 310.

CONCLUSION

The lower courts have, for all practical purposes, *nullified* the aspects of *Hudson* meaningfully protective of nonunion employees' First-Amendment and procedural-due-process rights in "fair-share-fee" cases. The decisions of those courts effectively extend unions *carte blanche* to collect such fees, without disclosing any rational basis — indeed, by flouting a patently *ir*rational basis — for the collections. And this license compels the employees either to acquiesce in the exactions and remain "in the dark about the source of the figure for the agency fee",[99] or "to object in order to receive information"[100] by proceeding to some *non*judicial forum that will not *and can not* adjudicate the unconstitutionality of the original notice in any event.

This result accords neither with *Hudson* itself, nor with decisions of other appellate courts applying *Hudson*, nor with any doctrine of procedural due process or the general requirements of a "rational basis" for governmental action that this Court has consistently applied elsewhere.

For these reasons, the teachers pray that this Court issue a writ of certiorari to the Court of Appeals.

Respectfully submitted,

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[99] *Id.* at 306.

[100] *Id.*

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

9 January 1991

BEST AVAILABLE COPY

[922 F.2d 1306]

Annie Lee HUDSON, K. Celeste Campbell, Estherlene Holme, Edna Rose McCoy, Debra Ann Petitan, Walter A. Sherrill and Beverly F. Underwood, Plaintiffs-Appellants,

v.

CHICAGO TEACHERS UNION, LOCAL NO. 1, Robert M. Healey, Jacqueline B. Vaughn, Rochelle D. Hart, Thomas H. Reece, Glendis Hambrick, Individually and as Officers of the Chicago Teachers Union, Board of Education of the City of Chicago, Illinois, Raoul Villalobos, Martha Jantho, Thomas Corcoran, Betty Bonow, Sol Brandzel, Clark Burrus, Leon Jackson, Rose Mary Janus, Dr. Wilfred Reid, Myrna Salazar, Dr. Luis Salces and Viola Thomas, Individually and as Officers and Members of the Board of Education of the City of Chicago, Illinois, Defendants-Appellees.

No. 89-2493.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 20, 1990.
Decided Jan. 9, 1991.

* * * *

[1307]Before COFFEY and RIPPLE, Circuit Judges, and REYNOLDS, Senior District Judge.*

RIPPLE, Circuit Judge.

The plaintiffs, nonunion teachers, filed a suit against the Chicago Teachers Union and the Chicago Board of Education

* Hon. John W. Reynolds, of the Eastern District of Wisconsin, sitting by designation.

that challenged the constitutionality of the procedural scheme employed by the Union to collect "fair share fees"[1] from their nonunion employees. In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), the Supreme Court held that the Union's procedural scheme was constitutionally defective. On remand, the district court concluded that the Union's revised procedural scheme was constitutionally adequate under the directives of *Hudson* and denied the plaintiffs' renewed motion to certify a class. The plaintiffs have appealed both rulings. For the following reasons, we affirm the judgment of the district court.

I

BACKGROUND

A. *Facts*

This litigation dates back to 1982. Several nonunion teachers brought suit against the Chicago Board of Education (Board) and the Chicago Teachers Union (CTU). The dispute pertains to an "agency shop agreement" entered into in 1982 between the Board and the CTU. An "agency shop agreement" is one that requires *every* employee in the collective bargaining unit, whether union or nonunion, to pay a fee to help defray the costs of collective bargaining and contract administration. These agreements originated in response to a perceived "free rider" problem created when nonunion members enjoy the benefits of union representation without contributing to the cost of that representation. The Supreme Court sanctioned the agency shop agreement concept in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

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[1] The term "fair share fee" is synonymous with the term "agency fee" and is a fee "paid by non-union employees to a union to cover the employees' pro rata share of the costs of the union's activities as the exclusive representative of the employees in dealing with management." *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1370 (7th Cir.1989).

Until 1982, members of the CTU financed the entire cost of collective bargaining and contract administration, and the nonunion teachers were "free riders." In 1981, however, the Illinois General Assembly amended the School Code to authorize the Board and the CTU to enter into an agency shop agreement. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 294-95, 106 S.Ct. 1066, 1069-70, 89 L.Ed.2d 232 (1986). In 1982, the Board and the CTU entered into such an agreement, which required the Board to deduct fair share fees from nonmembers' paychecks. *Id.* at 295, 106 S.Ct. at 1070. However, the Illinois statute strictly limited the amount of money deductible from nonmembers' salaries to their proportionate share of the cost of "the collective bargaining process and contract administration." *Id.* at 295 n. 1, 106 S.Ct. at 1070 n. 1. Such a limitation on the amount of nonmembers' contributions is required by first amendment considerations, which, the Supreme Court has held, forbid a union from collecting "from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis v. Railway Clerks*, 466 U.S. 435, 447, 104 S.Ct. 1883, 1891, 80 L.Ed.2d 428 (1984). The Supreme Court has also ruled that a union must supply nonmembers an adequate notice or explanation of the basis for the fair share fee so that the nonmembers may challenge the fee amount if they believe their first amendment rights were infringed as proscribed by *Ellis*. *See Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075. At the heart of this dispute is the adequacy of the notice procedure employed by the CTU to explain the basis for the fair share fee amount collected from the plaintiffs. For advance clarification, this appeal involves three separate fair share notice procedures. The first (FSN-1) was in place for the **[1308]** 1982-83 school year; the second (FSN-2), for the 1986-87 school year; and the third (FSN-3), for the 1987-88 school year.

B. *Procedural History*

1. FSN-1 and the Supreme Court's *Hudson* decision

In 1983, the plaintiffs challenged the constitutionality of the CTU's fair share fee amount for the 1982-83 school year. *See Hudson v. Chicago Teachers Union*, 573 F.Supp. 1505 (N.D.Ill. 1983). The CTU had computed the nonmembers' fair share fee of the relevant representational costs at ninety-five percent of union members' dues. *Id.* at 1509. The CTU also established a procedure for considering nonmembers' objections to the deduction (FSN-1). *Id.* at 1508. After receiving a minimal response from the CTU, the plaintiffs challenged FSN-1 in district court as violative of their first and fourteenth amendment rights. *Id.* at 1515.

The district court rejected these constitutional challenges. *Id.* On appeal, however, this court reversed. *See Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir.1984). We concluded that the constitution requires the CTU to implement a procedure that protects nonmembers from being compelled to subsidize ideological activities that are not germane to the collective bargaining process and that the CTU's FSN-1 was inadequate to meet this requirement. *Id.* at 1190, 1192. The Supreme Court granted certiorari and affirmed our judgment. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The Supreme Court concluded that FSN-1, as initially adopted by the CTU, contained three fundamental flaws: (1) its choice of a simple rebate remedy created an impermissible risk that nonmembers funds would be used (albeit temporarily) for an impermissible purpose; (2) the procedure failed to provide an adequate justification for the advance deduction of the fees; and (3) the procedure failed to provide a reasonably prompt resolution of disputes by an impartial decision-maker. *Id.* at 304-09, 106 S.Ct. at 1074-77. The Court also concluded that the CTU's attempt to remedy these flaws by placing all nonmember funds in escrow did not cure problems (2) and (3) above. *Id.* at 309-10, 106 S.Ct. at 1077-78. The Court

remanded the case to the district court to determine an appropriate remedy. *Id.* at 310, 106 S.Ct. at 1077.

2. District court's decision on class certification

In their initial action, the plaintiffs sought to maintain a class action on behalf of all similarly situated nonunion employees. *See* 573 F.Supp. at 1507. They had moved for certification of the class. However, because the district court upheld the constitutionality of FSN-1, the court dismissed the motion to certify as moot. *Id.* at 1522. On remand, the plaintiffs again moved for class certification. *See Hudson v. Chicago Teachers Union*, 117 F.R.D. 413, 414 (N.D.Ill.1987). The district court denied the motion. *Id.* at 415. It concluded that the decision to certify the class hinged on the single issue of the type of relief sought by the plaintiffs. The court reasoned that, while the plaintiffs' initial goal in the lawsuit appeared to be injunctive relief (a Rule 23(b)(2) class action),[2] the Supreme Court's adjudication of their case granted the relief the plaintiffs initially sought. *Id.* Moreover, under the Supreme Court's decision, the court noted, all prospective class members already were guaranteed a procedure that protected their first amendment rights. Thus, the court concluded, the only remaining rationale for certifying a class would be to allow the plaintiffs to seek damages from the CTU (a Rule 23(b)(3) class action).[3] Certification of a (b)(3) class, however, was precluded by the Seventh Circuit's and Supreme Court's prior adjudication of the merits of the plaintiffs' claims. *Id.* The court explained that Rule 23 requires certification of a (b)(3) class *prior* to a determination on the merits in order to prevent the inequitable **[1309]**practice of "one-way intervention" —in which a prospective plaintiff could avoid the binding effect of a potential adverse judgment by waiting to see if the litigation was successful on the merits before joining the class. *Id.* Thus,

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[2] *See* Fed.R.Civ.P. 23(b)(2) (class action for injunctive or declaratory relief).

[3] *See* Fed.R.Civ.P. 23(b)(3) (questions of law or fact common and predominative to the class).

the court believed it had no choice but to deny the plaintiffs' motion for certification. *Id.*

3. District court's decision on FSN-3

Meanwhile, the CTU attempted to revise its fair share notice procedure to comply with *Hudson*'s mandate. A revised procedure was implemented for the 1986-87 school year (FSN-2), but the plaintiffs challenged it as constitutionally inadequate under *Hudson*. While the adequacy of FSN-2 was before the district court, the parties agreed that all fair share fees collected by the CTU would be deposited with the clerk of the court pursuant to Rule 67 (Rule 67 funds).[4] *See Hudson v. Chicago Teachers Union*, 699 F.Supp. 1334 (N.D.Ill.1988). In June of 1987, the CTU moved for release of the Rule 67 funds on the ground that FSN-2 complied with the constitutional requirements set forth in *Hudson*. However, before the district court ruled on this motion, the 1987-88 school year began, and the CTU had further refined its fair share notice procedure (FSN-3). By agreement of the parties, the lawsuit focused on the adequacy of FSN-3 rather than FSN-2. The plaintiffs maintained their contention that FSN-3 did not comply with the Supreme Court's mandate.

The district court then considered another CTU motion to release the Rule 67 funds on the ground that FSN-3 complied with *Hudson*'s mandate. The court rejected the plaintiffs' claim that FSN-3 failed to comply with *Hudson*. To the contrary, the court concluded that the ability of the plaintiffs to criticize the CTU's calculation of the fair share fee based on its employment of allegedly inappropriate cost allocation methods and an improper definition of collective bargaining actually demonstrated that the CTU was complying with the primary mandate of *Hudson*: providing sufficient information to potential objectors to enable them to gauge the propriety of the fee. *Id.* at 1340,

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[4] *See* Fed.R.Civ.P. 67 (sum of money may be deposited with district court when it is the subject of requested judgment).

1343. The district court concluded that the plaintiffs' challenge to the CTU's methods for determining the fee mistakenly confused the separate issue of adequacy of notice with the issue of the accuracy of the fee itself. *Id.* at 1340. The court explained that, under *Hudson*, the notice procedure could pass constitutional muster without *necessarily* guaranteeing the accuracy of the fee. To address nonmembers' challenges to the accuracy of the fee, *Hudson* mandated that the CTU provide a reasonably prompt opportunity for the resolution of disputes by an impartial decisionmaker. *Id.* The purpose of the notice procedure was limited; it only had to give the plaintiffs enough information to evaluate the accuracy of the fee so that they could determine whether they wanted to challenge the fee. Moreover, the court noted that, if *Hudson* had intended the federal courts to scrutinize meticulously the accuracy of the fee, it would not have required the CTU to establish its own internal procedure for resolving fee disputes. *Id.* at 1340.

The court next addressed the plaintiffs' specific challenges to the fee calculation and the notice procedure. First, it concluded that the CTU's own arrangement for holding disputed funds in escrow would provide the plaintiffs protection until an impartial decisionmaker resolved their challenges to the fee. *Id.* at 1341. Thus, the court concluded that its holding these funds in escrow was duplicative and unnecessary. *Id.* The court rejected the plaintiffs' argument that FSN-3 had to explain the rationale for the underlying assumptions employed in calculating the fee. The court concluded that the mere disclosure of these underlying assumptions performed the constitutional function of enabling the plaintiffs to assess the propriety of the fee. *Id.* at 1341. It also rejected the plaintiffs' complaint that the notice lacked detailed breakdowns of activities and costs. The **[1310]**court noted the Supreme Court's statement in *Hudson* that the CTU "'need not provide nonmembers with an exhaustive and detailed list of all its expenditures.' Instead of mandating a notice filled with painstaking detail, the Constitution merely requires that a fair share notice 'include the major categories of expenses.'" *Id.* (quoting *Hudson*, 475 U.S. at 307 n. 18, 106 S.Ct. at 1076 n. 18).

The court then turned to the plaintiffs' objection that an independent auditor had not verified the CTU's underlying definition of "collective bargaining." The court agreed with the Second Circuit's reading of *Hudson*, which limited the auditor's role to the "usual function": ensuring the expenditures that the CTU claimed to make for certain expenses actually were made for those expenses. *Id.* at 1342 (citing *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987)).[5] The court noted that plaintiffs' proposed interpretation of the auditor's duties would usurp the function of the independent decisionmaker: "determining whether union expenses are properly chargeable to nonunion employees." *Id.* at 1341.

The court also determined that the CTU's method of verifying the distribution of its salary expenses between collective bargaining and non-collective bargaining activities passed muster. *Id.* at 1342. The court believed that the independent auditor had dug far enough beneath the surface to verify the conclusions reflected in the activity reports of salaried CTU personnel. *Id.* It further believed that the auditor's verification of salary expenses without resort to time reports was within the reasonable range of discretion accorded to the auditor. *Id.* at 1342-43.[6] Finally, the court rejected plaintiffs' argument that FSN-3 would mislead or confuse a literate person (i.e., a teacher) concerning the extent to which the auditor endorsed the underlying definition of collective bargaining in FSN-3. *Id.* at 1343.

In sum, the court concluded that the CTU's FSN-3 fulfilled the constitutional mandate of *Hudson* by providing the plaintiffs

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[5] The *Andrews* court's view of the auditor's role was adopted by this court in *Ping v. National Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir.1989) (finding *Andrews* explicitly repudiated the argument that an independent auditor must make legal determinations on whether an expense is chargeable, nonchargeable, or questionable).

[6] The court did, however, suggest that the CTU institute a procedure that would require its employees to fill out time reports in case a future auditor considered it necessary to examine such reports. 699 F.Supp. at 1343 n. 6.

with adequate information to evaluate the propriety of the fee calculation. The court reiterated that the detail of plaintiffs' objections to the fee calculation and the notice itself demonstrated that FSN-3 was serving its purpose. Discerning no further reason to hold the disputed fees in escrow, the court granted the CTU's motion to release the Rule 67 funds, ordered the CTU to hold any disputed fees in its own escrow pending resolution of these disputes, and ordered the CTU to exempt the plaintiffs from the deadline (which already had passed during the course of the litigation) for filing fee objections under the CTU's internal dispute resolution procedure. *Id.* at 1344.

4. Plaintiffs' motion for final judgment

After the district court issued its order and opinion on November 16, 1988, the plaintiffs moved, *inter alia*, for entry of a final judgment based on the order. The court denied the motion because the November 16 order did not resolve all of the issues raised by the plaintiffs' amended complaint. The court noted that the Supreme Court's ruling in *Hudson* clearly entitled the plaintiffs to an award of damages arising from the constitutional deficiencies in FSN-1, but that the district court had yet to address the issue of damages. The court indicated that, under the Federal Rules of Civil Procedure, a judgment does not become final until the court awards damages or other relief.

The plaintiffs also moved for a stay of the November 16 order pending appeal of that order. The court determined that the plaintiffs actually sought a reinstatement of the Rule 67 escrow arrangement. In [1311]response to this motion, the CTU offered to return these funds to escrow with the court and to deposit all of the plaintiffs' future fair share fees with the court pending resolution of the appeal. The district court concluded that this procedure would protect adequately the plaintiffs' interest during the pendency of the appeal and ordered the CTU to follow its proposed procedure. The court then denied the plaintiffs' motion for a stay because the CTU agreement to deposit the funds with the court rendered the issue moot.

5. Stipulation for entry of judgment

The district court set April 19, 1989, for a status hearing to address the remaining issues in the litigation. When plaintiffs' counsel failed to appear at the status hearing, the court dismissed the plaintiffs' case with prejudice. On April 28, 1989, the plaintiffs moved to vacate the order of dismissal. The court responded by setting another status conference for June 7, 1989. Following this conference, the parties entered into a Stipulation for Entry of Judgment, which was filed on June 21, 1989. This document stated that the parties "stipulate to the entry of a final judgment on the following terms":

> (1) the court's order dismissing the plaintiffs' case for failure to appear be reversed;
>
> (2) the plaintiffs, "*without waiving any right of appeal*," accept Judge Bua's decisions of October 14, 1987 (117 F.R.D. 413) (denying class certification) and November 16, 1988 (699 F.Supp. 1334) (holding FSN-3 constitutionally adequate) as "terminating the substantive issues in this action"; the plaintiffs also agree to "withdraw any claim not resolved by those decisions except": (A) an award to all plaintiffs of $1.00 in nominal damages (which the parties agreed to in the Stipulation); (B) reasonable attorney's fees and costs from the initiation of the suit through the date of the Supreme Court's 1986 decision in the case; and (C) any claims the plaintiffs might raise by invoking the FSN-3 procedure within 45 days of judgment;
>
> (3) each plaintiff receives $1.00 in nominal damages;
>
> (4) plaintiffs are allowed 120 days, pursuant to Local Rules 45 and 46, to file a petition for attorney's fees and costs if the parties cannot resolve that issue beforehand by stipulation;
>
> (5) the individual defendants in the case are dismissed with prejudice;

(6) plaintiffs have 45 days from the date of judgment to file appeals under FSN-3 with respect to the 1987-88 school year;

(7) all money now being escrowed pursuant to Rule 67 will be turned over to the CTU within 45 days of the date of this judgment. However, if plaintiffs file internal appeals under FSN-3, these disputed funds will be escrowed pursuant to Rule 67 until an arbitrator's determination (and possible subsequent judicial review) of the fee for 1987-88.

See Stipulation for Entry of Judgment at 1-3 (Appellant's App. A-15). On June 22, 1989, the district court vacated its earlier dismissal of the plaintiffs' case and entered judgment in accordance with the terms of the parties' Stipulation for Entry of Judgment.

6. This appeal

Following the entry of judgment, the plaintiffs filed a notice of appeal on July 18, 1989. The plaintiffs raise two issues on appeal: (1) whether the district court erred in denying its motion for class certification in its October 14, 1987 order (117 F.R.D. 413); and (2) whether the district court's order of November 16, 1988 (699 F.Supp. 1334) "erroneously granted an effective summary judgment to [the CTU] on the constitutionality of FSN-3 under *Hudson*, without addressing most of the underlying legal issues, and in the teeth of manifest dispute as to many material facts." Appellant's Br. at 16.

II

ANALYSIS

A. *Propriety of Our Review*

Before we address these issues, we must **[1312]**put to rest the Board's[7] arguments that certain impediments foreclose our review of this case. This task need not detain us long.

1.

The Board first contends that we lack appellate jurisdiction. This argument focuses on the Stipulation for Entry of Judgement described in the preceding section. The thrust of the argument is that, even though the Stipulation expressly stated that the teachers accept the district court's two decisions as terminating the substantive issues in the litigation, "*without waiving any right of appeal*," the Stipulation constituted a *settlement* rather than "an involuntary and adverse judgment." A settlement is not appealable.[8]

There appears to be a split among the circuits with respect to whether a stipulated judgment may be appealed. The Eleventh Circuit allowed an appeal when the parties' stipulation expressly stated an intent to appeal. *See Dorse v. Armstrong World Indus.*, 798 F.2d 1372, 1376 (11th Cir.1986). By contrast, the Fifth Circuit did not allow an appeal from a consent judgment

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[7] Pursuant to their motion to extend the time for filing their briefs, the Board and CTU divided the briefing task. The Board addressed the jurisdictional issues presented below, but for all practical purposes they represent the views of CTU as well.

[8] *See generally Geaney v. Carlson*, 776 F.2d 140, 142 (7th Cir.1985) (voluntary dismissal not appealable because it is not an involuntary adverse judgment); *Stewart v. Lincoln-Douglas Hotel Corp.*, 208 F.2d 379, 381 (7th Cir.1953) (party who consents to entry of order of judgment waives right to claim court committed error in entering the order).

even though "it contained a recognition that the plaintiff wished to appeal" the issues contained within the judgment. *Amstar Corp. v. Southern Pac. Transp. Co. of Texas & Louisiana*, 607 F.2d 1100, 1100 (5th Cir.1979) (per curiam), *cert. denied*, 449 U.S. 924, 101 S.Ct. 327, 66 L.Ed.2d 153 (1980). *But see Greenhouse v. Greco*, 544 F.2d 1302, 1305 (5th Cir.1977) (party who consented to dismissing case as moot so as to appeal district court's order was not barred from appealing the case because the party did not consent to a judgment that would preclude appellate review).

This circuit has not encountered the precise issue presented in *Dorse* and *Amstar*. However, we approvingly cited the *Dorse* decision in *Bash v. Firstmark Standard Life Insurance Co.*, 861 F.2d 159 (7th Cir.1988).[9] There we stated that one way a party could have sought an appeal of a partial summary judgment was by "negotiat[ing] a *settlement agreement* that was expressly conditional on the order of partial summary judgment being

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[9] Like the panel in *Bash*, we see much merit in the Eleventh Circuit's approach in *Dorse*. We note, as did the *Dorse* court, Justice Blackmun's dissent from denial of certiorari in *Amstar*. He suggested that *Amstar* was wrongly decided because it "ignores the parties' intent in executing a consent to a judgment and in their subsequent actions thereto." *Amstar Corp. v. Southern Pac. Transp. Co. of Texas & Louisiana*, 449 U.S. 924, 924, 101 S.Ct. 327, 327, 66 L.Ed.2d 153 (1980) (Blackmun, J., dissenting from denial of certiorari). Justice Blackmun believed "petitioner [was] entitled to a ruling on the merits of its appeal to the Court of Appeals, and [was] not to be foreclosed by a strict concept of consent and acceptance in the face of facts that asserted consent was specifically limited and that petitioner consistently and persistently disclaimed full settlement of the lawsuit." *Id.* at 927, 101 S.Ct. at 329. Justice Blackmun apparently believed those facts sufficient to raise "a claim of lack of actual consent." *Id.* at 926, 101 S.Ct. at 328 (quoting *Swift & Co. v. United States*, 276 U.S. 311, 314, 48 S.Ct. 311, 72 L.Ed. 587 (1928) (holding that a party could seek appellate review of a consent judgment containing no reservations relevant to the issue sought to be appealed if that party lacked "actual consent")). The plaintiffs' reliance on *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977) (per curiam), is misplaced. That case dealt *exclusively* with the "settled proposition" that one who accepts a remittitur, even "under protest," may not appeal to seek reinstatement of the original verdict. *Id.* at 649, 97 S.Ct. at 836.

upheld on appeal. Then it would have been clear that he was *not waiving his right to appeal by consenting to the entry of a final judgment.*" *Id.* at 162-63 (emphasis supplied) (citations omitted). *Bash* evidences regard for the Supreme Court's admonition that jurisdictional issues ought to be analyzed pragmatically. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. [1313]2218, 2225, 104 L.Ed.2d 893 (1989). We follow the same course here. Before the district court was the plaintiffs' motion to vacate the default judgment. While granting the motion to vacate, the district court accepted the parties' stipulation that resolved one unresolved issue between them—the amount of damages due because of FSN-1. The stipulation further memorialized their continued disagreement with respect to the other issues already decided by the district court. Under these circumstances, "the practicalities" certainly require that we treat the judgment entered by the district court as an appealable one.[10]

2.

The Board also maintains that this appeal presents no justiciable controversy. The Board points out that, while the district court's order of November 16, 1988 determined the constitutionality of FSN-3, it did so in the context of adjudicating CTU's motion for a release of the Rule 67 funds being held in escrow with the court. The stipulated judgment now requires that those funds remain in escrow. Therefore, argues the Board, the underlying issue is moot and the district court's opinion is purely advisory. In the Board's view, the district court's opinion

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[10] While we continue to see much merit in the Eleventh Circuit's approach in *Dorse*, we note that the unique procedural posture of this case does not require that we face squarely the apparent conflict between the Fifth and Eleventh Circuits. Once the district court vacated its default judgment, it entered a judgment that encompassed earlier rulings upon which there was clear disagreement among the parties. *See United States v. Procter & Gamble*, 356 U.S. 677, 680, 78 S.Ct. 983, 985, 2 L.Ed.2d 1077 (1958). Only the matter of damages was the subject of a true "stipulation."

and reasoning cannot be viewed independently from the relief granted.

We recognize that this court "'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311, 107 S.Ct. 2852, 2854, 97 L.Ed.2d 258 (1987) (per curiam) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956)). However, we must assess—pragmatically—the litigation in its totality. We think it clear that the district court's entry of a final judgment pursuant to the stipulation and judgment amounted to its denial of any relief to the plaintiffs with respect to their contention that FSN-3 is constitutionally infirm. That determination, in the context of this lawsuit, is hardly advisory. *See United States v. Procter & Gamble*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958).

B. *The Constitutionality of FSN-3 Under Hudson*

The plaintiffs challenge the district court's conclusion that the CTU's FSN-3 was constitutionally sufficient under the Supreme Court's directives in *Hudson*. The Supreme Court listed three procedural prerequisites to the receipt of fair share fees:

> We hold today that the constitutional requirements for the [CTU's] collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

475 U.S. at 310, 106 S.Ct. at 1078. The plaintiffs' attack focuses on the first requirement: an adequate explanation of the basis for the fee.

We believe the plaintiff's position suffers from a fundamental misapprehension as to what *Hudson* requires. Plaintiffs' complaints have little to do with the constitutional *adequacy* of FSN-3. Instead, the plaintiffs attack how the CTU *calculated* the fair share fee. They claim that the CTU has based its fee

calculation on an incorrect definition of collective bargaining services, identified categorical expenses too broadly, relied on an economically "invalid" method for allocating costs between chargeable and non-chargeable categories, allocated as chargeable costs activities which do not benefit teachers, employed "incomplete, insufficient, and misleading" accounting verifications, and used incorrect formulas in calculating allocable **[1314]**costs for collective bargaining. Taken in its entirety, plaintiffs' challenge asserts that a prior hearing and prior judicial determination of the correctness of a fair share fee is a precondition to the collection of the fee. Requiring the federal courts to micro-manage the fee calculation in every case challenging a union's fair share fee would place an overwhelming and unrealistic burden on the courts. More fundamentally, we agree with the district court's assessment that the plaintiffs' challenge "mistakenly equates the adequacy of the notice with the accuracy of the fee assessment," *Hudson*, 699 F.Supp. at 1340, and thus squarely contradicts *Hudson*'s holding and rationale. Contrary to the plaintiffs' position, *Hudson* did not contemplate that federal courts would be required, on the basis of the notice, to pass on the legality and accuracy of every element of the fee calculation before any fees could be collected. Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. The Supreme Court's prerequisites presuppose that a fee has already been collected and that the challenge will be decided after the fee has been collected. The federal court does not, at this stage, review the fee calculation. Indeed, the Supreme Court noted, "[i]n other First Amendment contexts, of course, we have required swift judicial review of the challenged government action. In this context, we do not believe that such

special judicial procedures are necessary." 475 U.S. at 307 n. 20, 106 S.Ct. at 1076 n. 20. Of course, the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court. *See id.* at 308 n. 21, 106 S.Ct. at 1077 n. 21.

The singular role of the federal courts in reviewing the adequacy of a fair share notice is to determine whether the notice gives the nonunion members enough information to challenge the basis for the fee. *See id.* at 306, 106 S.Ct. at 1075 (holding that the notice procedure must provide potential objectors "sufficient information to gauge the propriety of the union's fee"); *Gilpin v. American Fed'n of State, County, & Mun. Employees*, 875 F.2d 1310, 1316 (7th Cir.) (court noting the notice procedure contained enough information "to allow the employees to decide whether there is any reason to mount a challenge"), *cert. denied*, __U.S.__, 110 S.Ct. 278, 107 L.Ed.2d 258 (1989); *Gwirtz v. Ohio Educ. Ass'n*, 887 F.2d 678, 682 (6th Cir.1989) (holding that *Hudson* only requires union's procedure to provide adequate disclosure so that nonmember employees could "gauge the propriety of the union's fees"), *cert. denied*, __U.S.__, 110 S.Ct. 1810, 108 L.Ed.2d 941 (1990); *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987) (holding that once the union's procedure satisfies *Hudson* standard, it should be upheld even if nonmembers can provide better procedure).

In determining the adequacy of FSN-3's notice, our course has been chartered by *Ping v. National Educ. Ass'n*, 870 F.2d 1369 (7th Cir.1989) and *Gilpin*. In interpreting the fair share notice prerequisite articulated in *Hudson*, the *Ping* court concluded that "the union must disclose sufficient information to permit non-members to make an informed decision about whether to object to the amount of the fair share fee." 870 F.2d at 1372 (citing *Hudson*, 475 U.S. at 306-07, 106 S.Ct. at 1075-76). One month following the *Ping* decision, the *Gilpin* court decided a challenge to the adequacy of a union's fair share notice. A comparison between the fair share notice upheld in *Gilpin*, and

the CTU's FSN-3, leads us to conclude that FSN-3 likewise is adequate under *Hudson*.

[1315]The *Gilpin* plaintiffs complained that the union's notice lacked sufficient detail to enable them to determine the probable success of a challenge to the fair share fee. Yet the court noted:

> [T]he notice breaks down the union's activities into 35 categories and indicates which ones the union considers activities wholly in support of its agency mission (e.g., adjusting grievances under the collective bargaining agreement), which it considers wholly unrelated to that mission (e.g., contributing to political campaigns), and which it considers a mixture of agency and other functions (e.g., publishing a union newsletter). The notice recites that the arbitrator has found that the union's allocation of expenses in accordance with this breakdown is proper, and offers a copy of his detailed ruling for $1.50. The notice contains another list of 35 items—not the 35 separate activities that the union engages in but the 35 different types of expenditures listed in its audited financial statement (salaries and benefits, depreciation, telephone, etc.)—and indicates what percentage of each is chargeable to union nonmembers as part of the agency fee.

875 F.2d at 1316. The court rejected the plaintiffs' complaint that the notice did not explain the principles under which chargeable expenses were allocated to the fee because "if it did, the notice would be as long and complicated as an SEC prospectus." *Id.* The court observed that the notice did indicate which activities were wholly or partly pursuant to collective bargaining activities and what percentage of each expenditure item is allocated for such. *Id.* Thus, the court concluded, "[t]his should be enough information . . . to allow the employee to decide whether there is any reason to mount a challenge." *Id.*

In the present case, the CTU's thirty-nine page FSN-3 is more complete and more informative than the three page notice

approved in *Gilpin*. It informs nonmember employees that their fair share fee reflects the nonmembers proportionate share of the costs of services rendered by the CTU, necessarily and reasonably incurred for the purpose of performing collective bargaining activities. The FSN-3 identifies and defines two categories: chargeable expenses and non-chargeable expenses. Each category is defined and further broken down to specific items of expenditures.[11] The non-chargeable expenses category follows a similar detailed breakdown. The FSN-3 contains the CTU's audit report prepared by its independent certified public accountant. The CTU's accountant issued a "special report," which, the CTU informs us and plaintiffs do not contest, is the highest level of review and the best format for presenting the results of such a review. The report allocates expenses in twenty-two line items between those that are chargeable and those that are nonchargeable and provides a dollar amount for each category.[12] The

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[11] The notice provides a listing of chargeable expenses: "negotiating and administering the collective bargaining contract; settling grievances and disputes by mutual agreement, or in arbitration, court or otherwise; activities and undertakings normally and reasonably employed to implement the duties of the Union as exclusive representative of the employees in the bargaining unit; and the maintenance of the Union's associational existence."

The notice then provides examples of chargeable expenses: "preparation for and negotiations of collective bargaining agreements with the Chicago Board of Education; contract administration including investigation and processing grievances; meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work related subjects and issues; handling work related problems of employees; communications with community organizations, civic groups, government agencies and the media respecting the Union's position on work related matters; lobbying and legislative activities with respect to matters concerning employees' work related issues; maintaining membership and recruitment of Board employees; employees group programs; and providing legal, economic and technical expertise in behalf of employees in all matters relating to work related matters."

[12] For example, the report classifies expenditures in general categories such as affiliation fees, salaries, employee benefits, travel and other employee expenses,

[note continued]

report further provides a [1316]detailed explanation of the techniques employed in producing the report.[13] The FSN-3 also provides similar audit reports for the state and national unions affiliated with the CTU.

The FSN-3 provides a two page summary sheet that gives an overview of how the accounting reports were translated into calculation of the fair share fee. The summary breaks down the CTU's expenditures into thirteen functional categories, providing the percentage of total expenditures within each category. Twelve of the categories are treated as chargeable in calculating the fair share fee, and the thirteenth category groups all non-chargeable expenditures.[14] Moreover, the FSN-3 details the arbitration procedure available to employees who wish to challenge the fee, and the rights of employees in that procedure.[15] It explains that an employee may initiate a challenge by stating an objection in a letter to the CTU and that the CTU will have the burden of proving that the fee amount is pursuant to

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legislative, and rent and utilities, and then allocates the expenditures into those that are chargeable and those that are nonchargeable, accompanied by a dollar amount allocated to each category.

[13] The report explains the method of accounting used in producing the report, the definitions of chargeable and nonchargeable expenses, and material factors and assumptions used to allocate expenditures within each of the 22 general expense classifications. For example, the report explains that salaries of officers and field staff were allocated between chargeable and nonchargeable categories based on review of the CTU's records for these employees, interviews with the employees, and a review of the employees' own records.

[14] Thus, the reader can quickly determine that the non-chargeable expenses (political and ideological expenses) amounted to 14.16% of the total amount of dues charged to members of the CTU.

[15] We note the extensive detail of FSN-3: the *Gilpin* notice described the procedure in half a page; the FSN-3 spends seven pages explaining the CTU's internal appeal procedure (including how to file an objection) and the rules developed by the American Arbitration Association, the organization which arbitrates any challenges to the fair share fee assessment.

applicable federal and state law in any arbitration proceeding. Finally, the CTU offers to make available to a challenger any relevant books and records prior to and in preparation for the arbitration proceeding.

After reviewing the FSN-3, we conclude that the district court properly found that it was constitutionally adequate under *Hudson* and in accordance with our prior precedents because it provides sufficient information to enable the plaintiffs "to decide whether there is any reason to mount a challenge." *Gilpin*, 875 F.2d at 1316. We have reviewed other cases in which courts have found the notice provisions inadequate under *Hudson*. The CTU's FSN-3 suffers from none of the deficiencies identified in those cases.[16] As we noted above, the plaintiffs have advanced a plethora of objections to the CTU's methods for calculating the fair share fee amount. We need not pass on their merits because the proper forum for these objections is before the independent arbitrator, not before this court.

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[16] For example, in *Grunwald v. San Bernardino Unified School District*, 917 F.2d 1223 (9th Cir.1990), the notice provision was defective because it (1) failed to provide for advance fee reductions, and (2) failed to furnish nonmembers with advance notice prior to collecting the fee. *Id.* at 1227-29. In *Damiano v. Matish*, 830 F.2d 1363 (6th Cir.1987), the notice provision faltered because it (1) failed to inform the nonmembers of the actual amount of the fee or how it had been calculated, (2) forced the nonmembers to specifically request information about the basis for the fee, and (3) required the nonmembers to object to the fee amount without having information about the amount of the fee, the method used to calculate the fee, or the major activities for which the fee would be used. *Id.* at 1370-71. Likewise, the notice provision failed in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987), because it (1) required a forced extraction of the full union due amount followed by a rebate to nonmembers, (2) provided no instruction to nonmembers regarding the making of an effective objection, and (3) failed to provide for an impartial decisionmaker. *Id.* at 1505-06.

C. *Class Certification*

Although we have ruled adversely to the plaintiffs' FSN-3 challenge, we still must address their class certification contention. On remand from the Supreme Court, the district court denied the plaintiffs' renewed motion to certify a class. It reasoned that the Supreme Court's adjudication of FSN-1 provided the injunctive relief initially sought by the plaintiffs and **[1317]** also protected all prospective class members. *See Hudson*, 117 F.R.D. at 415. Therefore, the court observed that the only remaining reason to certify a class would be to recover damages because of the deficiencies found in FSN-1. The court noted that the Federal Rules of Civil Procedure require that a class action seeking damages must be certified *before* a determination on the merits in order to prevent the inequitable practice of "one-way intervention." *See id.* The plaintiffs contend that the court mischaracterized their motion. The plaintiffs take issue with the district court's conclusion that they sought class certification only for the purpose of obtaining money damages for the violation of constitutional rights under FSN-1. Instead, the plaintiffs contend that, pursuant to their amended complaint, they sought both injunctive relief and monetary damages for constitutional violations arising from FSN-1 and *any other* fair share notice presented by the CTU after FSN-1 that failed to meet *Hudson*'s mandates. Thus, the plaintiffs argue, because no court had ruled on the constitutionality of FSN-3 at the time of the motion, the district court incorrectly applied the "one-way intervention" rationale to bar certification.

To the extent that the plaintiffs' motion for certification sought monetary damages for constitutional violations under FSN-1, the district court correctly articulated the Supreme Court's and this circuit's rationale for denying certification on the "one-way intervention" rationale. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547, 94 S.Ct. 756, 763, 38 L.Ed.2d 713 (1974); *Roberts v. American Airlines, Inc.*, 526 F.2d 757, 763 (7th Cir.1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976); *Jimenez v. Weinberger*, 523 F.2d 689, 697-98 (7th Cir.1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d

1204 (1976); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353-54 (7th Cir.1975). Moreover, to the extent that the plaintiffs' motion sought certification for purposes of obtaining injunctive relief or monetary damages based on FSN-3 or any future version of the notice procedure, we uphold the district court's decision to deny the class certification on the independent ground that, in light of our decision today, the matter is moot.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

16 November 1988

BEST AVAILABLE COPY

[699 F. Supp. 1334]
Annie Lee HUDSON, et al., Plaintiffs,

v.

The CHICAGO TEACHERS UNION, LOCAL NO. 1, et al., Defendants.

No. 83 C 2619.

United States District Court,
N.D. Illinois, E.D.

Nov. 16, 1988.

* * * *

[1336]MEMORANDUM ORDER

BUA, District Judge.

Under the terms of an agency shop agreement, a union may represent a collective bargaining unit that includes nonunion employees. Ever since it recognized the validity of the agency shop, the Supreme Court has striven to strike an appropriate balance between the competing rights of unions and nonunion employees in the agency shop context. *See, e.g., Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). In its latest effort to preserve this delicate balance, the Court has held that before a union can collect fair share fees from nonunion employees, the Constitution requires the union to provide "an adequate explanation of the basis for the fee." *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310, 106 S.Ct. 1066, 1078, 89 L.Ed.2d 232 (1986). Spurred by the Supreme Court's *Hudson* directive, the Chicago Teachers Union ("CTU") overhauled its constitutionally deficient fair share scheme, developing and promulgating a more elaborate notice of its fair share fee. In the two years

since the *Hudson* case was remanded to this court, the CTU has continued to collect fair share fees, but has deposited these revenues with the Clerk of the Court pending a determination that the CTU's revised notice is constitutionally sufficient. The CTU now moves this court to authorize the release of the fair share funds held in escrow. After examining the CTU's fair share fee notice for the 1987-88 school year, this court concludes that the CTU has satisfied the notice requirement established by the Supreme Court in *Hudson*. Therefore, the court grants the CTU's motion to release the fair share [1337] funds currently held by the Clerk of the Court.

PROCEDURAL HISTORY

Under the terms of a 1967 collective bargaining agreement, the CTU serves as the exclusive representative of a bargaining unit composed of 27,500 employees of the Chicago Board of Education ("Board"). Although the CTU negotiates employment contracts for all employees in the bargaining unit, approximately 5% of these employees do not belong to the CTU. During the first fifteen years of the bargaining unit's existence, dues collected from CTU members provided the sole source of financing for the CTU's collective bargaining efforts. Thus, until the early 1980s, nonunion employees in the bargaining unit received all the benefits of collective bargaining without bearing any of the costs. In an effort to remedy this "free rider" problem, the Illinois General Assembly amended the state's School Code by enacting a fair share fee statute in 1981. The statute provided that when a school board has a collective bargaining agreement with its employees, the board may require that its nonunion employees pay their proportionate share of the cost of collective bargaining to the union representing the bargaining unit. To ensure enforcement of a school board's fair share fee requirement, the statute also authorized the board to make appropriate deductions from the paychecks of nonunion employees. Ill.Rev.Stat. ch. 122, para. 10-22.40a (1987). Acting under this newly granted statutory authority, the Board began to deduct proportionate share payments from the paychecks of its nonunion employees during

the 1982-83 school year. The CTU assisted the Board in implementing this fair share scheme by calculating the amount of the proportionate share deduction. Based on financial records from the previous year, the CTU determined that approximately 5% of its expenditures did not relate to collective bargaining or contract administration. Consequently, the CTU set the proportionate share fee at 95% of union dues. In anticipation of complaints from the Board's nonunion employees, the CTU also established a procedure for considering objections to the amount of the proportionate share deduction.

In March 1983, seven of the Board's nonunion employees filed this lawsuit against the CTU, the Board, and their respective officers. Basing their suit on 42 U.S.C. § 1983, plaintiffs assailed the constitutionality of the Illinois fair share fee statute. They asserted that the statute, both on its face and as applied, violated their rights under the First and Fourteenth Amendments. In addition to seeking damages, plaintiffs requested a preliminary injunction prohibiting the Board from making any further proportionate share deductions. After conducting a hearing on the subject, this court denied plaintiffs' motion for a preliminary injunction. 573 F.Supp. 1505 (N.D.Ill.1983). In rejecting plaintiffs' request for injunctive relief, the court found that the challenged statute was facially valid. *Id.* at 1512-14. The court also determined that defendants' application of the statute did not offend the Constitution. Under the Board's 1982 fair share deduction scheme, the CTU made a prededuction adjustment of the fair share fee. Additionally, the CTU provided nonunion employees with a postdeduction opportunity to object to the fee. If an employee raised a valid objection to the amount of the fee, the CTU would issue rebates of any improperly deducted funds to all nonunion employees. The court concluded that these procedures adequately safeguarded plaintiffs' constitutional rights. *Id.* at 1514-21.

Disagreeing with this conclusion, the Seventh Circuit reversed this court's judgment. 743 F.2d 1187 (7th Cir.1984). A three-judge appellate panel found that although the fair share fee statute passed constitutional muster, the CTU's procedures for

implementing the statute violated plaintiffs' constitutional rights. In particular, the panel criticized the CTU's objection procedure, which provided for postdeduction arbitration and rebates. Writing for two of the three judges on the panel, Judge Posner ruled that this procedure did not take sufficient precautions against the improper use of fair share contributions to **[1338]** finance political or ideological activities unrelated to collective bargaining. *Id.* at 1194-96. As the Supreme Court recognized in *Abood v. Detroit Board of Education*, *supra*, a union's expenditure of fair share funds to support political causes violates nonunion employees' First Amendment rights to free speech and free association. Judge Posner's critique of the CTU's procedure, however, went beyond the First Amendment concerns articulated by *Abood*. In an unprecedented ruling, he asserted that the Fourteenth Amendment prohibits a union from using fair share funds "to support any union activities that are not germane to collective bargaining, whether or not the activities are political or ideological." 743 F.2d at 1194 (emphasis in original). The challenged CTU procedures did not entirely foreclose the possibility that the CTU might spend fair share contributions on nonpolitical activities unrelated to collective bargaining. Consequently, based on his novel "due process" theory, Judge Posner concluded that defendants' fair share scheme unconstitutionally deprived plaintiffs of their liberty of association without due process. *Id.* at 1194-96.

Judge Flaum, the third judge on the *Hudson* panel, concurred in the result. *Id.* at 1197 (Flaum, J., concurring). He agreed with the other judges on the panel that the CTU's procedure for considering objections to the proportionate share fee did not adequately protect the First Amendment rights of nonunion employees. *Id.* at 1198-99 (Flaum, J., concurring). With respect to Judge Posner's finding of a due process violation, however, Judge Flaum parted company with his colleagues. According to Judge Flaum, both the Illinois statute and the Board's collective bargaining agreement prohibited the very same expenditures that Judge Posner found impermissible under the due process clause. Since the courts could preclude such improper expenditures simply by applying state law, Judge Flaum

reasoned that the Court of Appeals did not need to reach the due process issue. Regarding Judge Posner's due process analysis as unnecessary and inappropriate, Judge Flaum declined to join the majority opinion. *Id.* at 1199-1200 (Flaum, J., concurring).

Defendants appealed the Seventh Circuit's *Hudson* ruling to the Supreme Court. A unanimous Court affirmed the Seventh Circuit's finding that defendants' fair share scheme did not adequately guard against ideological expenditures that would violate the First Amendment rights of nonunion employees. 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Unlike Judge Posner, however, the nine Justices saw no need to consider the due process implications of nongermane, nonideological expenditures. *Id.* at 304 n. 13, 106 S.Ct. at 1074 n. 13.[1] Having invalidated the CTU's objection procedure on First Amendment grounds, the *Hudson* Court focused on devising a procedural framework that would better protect the free speech rights of fair share contributors. The Court held that when a union collects proportionate share fees, the Constitution requires that the union provide nonunion employees with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1078. After articulating these procedural requirements, the Supreme Court remanded the *Hudson* case to this court for the determination of an appropriate remedy. *Id.* at 310-11, 106 S.Ct. at 1078.

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[1] *See also id.* 475 U.S. at 311, 106 S.Ct. at 1078 (White, J., concurring) ("[S]ince the Court, as did Judge Flaum in the Court of Appeals, deems it unnecessary to reach the issue of nongermane, nonideological expenditures, the panel's remarks on the subject are therefore obvious dicta. Under our cases, they are also very questionable.").

Following the remand, plaintiffs moved for certification of a class action on behalf of all nonunion employees in the bargaining unit. This court referred the motion to Magistrate Joan Lefkow, who recommended class certification. Declining to adopt the magistrate's recommendation, the court denied plaintiffs' motion for class certification in October 1987. 117 F.R.D. [1339] 413 (N.D.Ill.1987). The court observed that plaintiffs' Supreme Court victory had already ensured injunctive relief for all prospective class members. Given the success already achieved by plaintiffs, only one objective would remain for the proposed class to pursue: the acquisition of money damages for individual class members. In accordance with Seventh Circuit case law, this court concluded that the previous adjudication of the merits of plaintiffs' claims precluded certification of a class whose members sought money damages. *Id.* at 415.

In the meantime, the CTU began taking steps to comply with the Supreme Court's *Hudson* mandate. At the outset of the 1986-87 school year, the CTU provided nonunion employees in its bargaining unit with a revised notice of the fair share fee. Pending a determination that the CTU's revised notice passes constitutional muster, the parties to this lawsuit agreed that all fair share funds collected by the CTU would be deposited with the Clerk of the Court. *See* Fed.R.Civ.P. 67. In June 1987, the CTU moved for release of these funds, contending that its 1986-87 fair share notice satisfied the constitutional requirements established by the Supreme Court in *Hudson*. By the time plaintiffs filed their objections to the CTU's motion to release, the 1987-88 school year had commenced, and the CTU had further refined its fair share notice. At this point, the parties shifted their attention to the newly promulgated 1987-88 notice. The CTU argued that this new notice adequately protected plaintiffs' constitutional rights, thereby justifying dissolution of the escrow arrangement. In response, plaintiffs renewed their objection to the release of fair share funds to the CTU. While conceding that the CTU had improved on its fair share notice from the previous year, plaintiffs insisted that the 1987-88 notice remained constitutionally deficient.

DISCUSSION

In the belligerent, intransigent style that has typified their arguments throughout this litigation, plaintiffs stridently oppose the release of any fair share funds to the CTU. They contend that the CTU has made little or no progress in producing a notice that complies with the Supreme Court's *Hudson* mandate. Curiously, however, plaintiffs' most adamant objections to the motion to release have nothing to do with the sufficiency of the CTU's fair share notice. Instead, plaintiffs complain most vociferously about the CTU's calculation of the fair share fee. For instance, they claim that the CTU has based its fee calculation on "legally incorrect" definitions of collective bargaining.[2] Plaintiffs also criticize the CTU for using a direct-cost methodology to allocate costs between collective bargaining and nongermane activities. Based on the deposition testimony of Sam Peltzman, a University of Chicago economist, plaintiffs assert that the economically flawed direct-cost method of cost allocation produces an unreliable estimate of the fair share fee. They insist that the CTU cannot hope to make an accurate assessment of the fee without first adopting a marginal-cost methodology for allocating costs.[3] In **[1340]**addition, plaintiffs challenge the

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[2] Plaintiffs claim to have identified "glaring definitional errors" in the notice. The definitions challenged by plaintiffs, however, are not as obviously erroneous as plaintiffs would have this court believe. For instance, plaintiffs assert that the CTU erred in classifying union organizing and public relations as "collective bargaining." The Illinois Educational Labor Relations Board recently rejected this argument, concluding that Illinois law permits a union in an agency shop context to charge nonunion employees for the expenses of union organizing. *Klaetsch and Lake County Federation of Teachers, Local 504*, No. 85-FS-0044-C, slip op. at 66-67 (IELRB June 24, 1988).

[3] Ironically, if plaintiffs were to succeed in imposing marginal cost accounting on the CTU, they might ultimately discover that they had achieved a Pyrrhic victory. Professor Peltzman has testified that under a marginal-cost methodology, the fee charged to nonunion employees could eventually exceed the dues paid by

[note continued]

propriety of the CTU's formula for determining nonunion employees' proportionate share of collective bargaining costs.

Even assuming the validity of these arguments, plaintiffs' objections to the calculation of the fee have little if any relevance to the issue that now confronts this court: Is the CTU's 1987-88 fair share notice constitutionally sufficient,[4] thereby justifying release of the funds held in escrow? If anything, plaintiffs' specific attacks on the derivation of the fee suggest that the revised notice is performing its proper constitutional function—providing potential objectors with "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075. After all, plaintiffs could not possibly have raised such detailed objections to the fee if the CTU's fair share scheme continued to "[l]eav[e] the nonunion employees in the dark about the source of the figure for the agency fee." *Id.*

Plaintiffs argue that the CTU's fair share notice cannot survive constitutional scrutiny unless the notice incorporates legally correct definitions of collective bargaining and an economically sound methodology for calculating the fair share fee. This

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CTU members. Deposition of Sam Peltzman, May 27, 1988, at 119. This unpalatable outcome would undoubtedly give plaintiffs a new appreciation of the CTU's direct-cost methodology. Plaintiffs have derisively characterized this direct-cost approach as "voodoo economics"; but the vagaries of the "science" of economics can transform catcalls into cheers, as George Bush can attest. During his 1980 campaign for the Presidency, Bush used the term "voodoo economics" to describe the economic policies of one of his rivals—Ronald Reagan. Eight short years later, President-elect Bush is lauding the very same economic policies that he once dismissed as "voodoo."

[4] Although the CTU originally moved for release of its funds on the basis of its 1986-87 notice, subsequent refinements in the notice for the following school year have rendered the 1986-87 notice obsolete. Moreover, the CTU has agreed to refund all of plaintiffs' 1986-87 fair share payments. Due to these developments, the constitutionality of the 1986-87 notice has become a moot issue.

argument mistakenly equates the adequacy of the notice with the accuracy of the fee assessment. The Supreme Court in *Hudson* recognized that a fair share notice could sufficiently serve its constitutional purpose—providing information about the basis for the fee—without necessarily guaranteeing the accuracy of the fee. In fact, the *Hudson* Court anticipated that nonunion employees might dispute the amount of the fee after reviewing the notice. To deal with this contingency, the Court required the CTU to provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1078. In light of the overall procedural framework prescribed by *Hudson*, plaintiffs cannot plausibly contend that the notice's adequacy depends on the fee's accuracy. Based on their conception of "adequate notice," plaintiffs would have this court purge the CTU's fair share scheme of all imperfections before releasing the funds held in escrow. Such extensive judicial intervention in the initial calculation of the agency fee would effectively eliminate the need for *Hudson*'s impartial decisionmaker. Having required the CTU to establish its own objection procedure, the *Hudson* Court could not have intended for the federal judiciary to supersede the internal union procedure for resolving fee disputes. By urging this court to consider the alleged errors in the CTU's fee calculation, plaintiffs are asking the court to overstep the bounds imposed by an appropriate sense of judicial restraint. As one illustrious appellate judge has already discovered during this litigation, the Supreme Court will not tolerate such a gratuitous exercise in judicial activism. *See, e.g., id.* at 304 n. 13, 106 S.Ct. at 1074 n. 13 (*Hudson* Court found no need to reach due process issue addressed by Judge Posner); *id.* at 311, 106 S.Ct. at 1078 (White, J., concurring) (dismissing Judge Posner's due process remarks as "very questionable" dicta).

Plaintiffs assert that their fundamental objections to the CTU's legal and economic methodology call into question the entire basis for the fee. For this reason, plaintiffs insist that all fair share revenues should remain in escrow. Admittedly, plaintiffs' challenges to the calculation of the fee probably justify

the maintenance of an escrow arrangement—but not in federal [1341]court. In the event that plaintiffs raise their fee objections under the CTU's revised fair share procedure,[5] the CTU will hold any disputed funds in escrow until an impartial decisionmaker evaluates plaintiffs' challenges. In light of the CTU's own provision for escrow, this court sees no reason to preserve the federal escrow currently in effect unless the CTU's notice has failed to provide potential objectors with sufficient information about the fee. Therefore, in the context of the CTU's motion to release, the court finds plaintiffs' objections to the fee's derivation largely irrelevant. By making these objections in this forum, plaintiffs are simply wasting their breath—and this court's time.

This is not to say that plaintiffs have presented no pertinent arguments in opposition to the CTU's motion. In addition to questioning the CTU's calculation of the fee, plaintiffs make several attacks on the adequacy of the CTU's notice. Initially, they claim that the notice provides "subminimal" information about the fee. Despite this melodramatic characterization, plaintiffs can point to only two supposed deficiencies in the information supplied by the notice. First, plaintiffs note that the notice sets out no rationale for the CTU's choice of material

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[5] As part of its internal objection procedure, the CTU has imposed a deadline for filing objections to the 1987-88 fair share fee. Technically, that deadline has passed. This court believes, however, that plaintiffs should receive an exemption from the deadline. After all, plaintiffs did not file timely objections with the CTU because they mistakenly believed that this court would redress their grievances. Although plaintiffs erred when they complained to this court about the fee's calculation, that error should not cost plaintiffs the opportunity for a hearing on their fee objections. These objections, which challenge the very foundation of the fee, should receive the attention of an impartial decisionmaker under the *Hudson* procedural scheme. For this reason, the court instructs the CTU to exempt plaintiffs from the 1987-88 objection deadline, thereby enabling plaintiffs to file their objections under the CTU's own procedure. Accordingly, the CTU shall offer plaintiffs a prompt opportunity to present their 1987-88 fee objections before an impartial decisionmaker.

factors and assumptions in calculating the fee. While plaintiffs might find this information helpful, the Supreme Court never indicated—and this court does not believe—that the Constitution requires the CTU to explain its rationale for making certain assumptions. Simply by disclosing these underlying assumptions, the CTU's notice is performing its proper constitutional function, enabling nonunion employees to assess the propriety of the fee. Plaintiffs also complain that the notice lacks detailed schedules breaking down activities and costs. The Supreme Court, however, has already concluded that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures." *Id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18. Instead of mandating a notice filled with painstaking detail, the Constitution merely requires that a fair share notice "include the major categories of expenses." *Id.* The CTU's notice satisfies this constitutional requirement. Moreover, despite its failure to include detailed financial schedules or set forth the rationale behind every assumption, the CTU's notice is serving its intended purpose within the *Hudson* procedural framework. Ironically, plaintiffs' own challenges to the fee demonstrate that the notice is providing potential objectors with sufficient information to gauge the fee's propriety. Plaintiffs' impressive litany of fee objections betrays the absurdity of their claim that the notice supplies "subminimal" information.

Plaintiffs also contend that the CTU did not subject its notice to adequate "verification by an independent auditor" in accordance with the Supreme Court's *Hudson* mandate. *Id.* They assert that the auditor who reviewed the notice should have verified the validity of the CTU's collective bargaining definitions instead of accepting those definitions without question. Under this interpretation of *Hudson*'s verification requirement, the auditor would usurp the impartial decisionmaker's function: determining which union expenses are properly chargeable to nonunion employees. In rejecting this interpretation of the auditor's responsibilities, the Second Circuit reasoned that the *Hudson* Court [1342]envisioned a much more limited role for the auditor: "*Hudson*'s auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled. That

usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir.1987). This court agrees with the Second Circuit's reading of *Hudson*. The Supreme Court could hardly have intended for an auditor to make difficult legal judgments concerning the appropriate allocation of expenses between collective bargaining and nongermane activities. Rather, verification under *Hudson* merely entails the performance of an auditor's typical function: attesting that a union actually spent its money in the manner represented by the fair share notice.

Given the limited role of the independent auditor, plaintiffs' only plausible challenges to the verification revolve around the CTU's distribution of its salary expenses between the chargeable and nonchargeable categories. To determine the proportion of its salary costs attributable to collective bargaining, the CTU requires all of its salaried employees to keep written reports of their job activities throughout the year. Based on these activity reports, each employee makes a year-end calculation of the percentage of his job that relates to collective bargaining. From these percentages, the CTU derives the proportion of its salary expenses that it incorporates into the fair share fee. According to plaintiffs, the auditor did not adequately verify the collective bargaining percentages calculated by individual CTU employees, the basis for the CTU's estimate of chargeable salary costs. Plaintiffs complain that the CTU did not promulgate uniform standards for completing the activity reports, creating the likelihood of idiosyncratic reporting by individual employees. Such discrepancies would cast doubt on an auditor's verification if his conclusions rested solely on an analysis of the activity reports. The auditor who verified the CTU's notice, however, looked beyond the activity reports. In assessing the reasonableness of an employee's collective bargaining percentage, the auditor compared the employee's expense reports with his activity reports, reviewed the employee's personal calendar, even interviewed the employee about the nature of his job. Deposition of Paul A. Merkel, April 22, 1988, at 43-62. This compre-

hensive approach to verification minimized the impact of any deviations in the activity reports of individual employees.

Plaintiffs also criticize the auditor for uncritically accepting the representations of CTU employees without asking whether those employees understood or applied the proper definition of collective bargaining. This criticism ignores the auditor's efforts to identify and investigate any questionable categorizations of job activities by CTU employees. The auditor has testified that whenever he discovered a potential inconsistency between an employee's classification of an activity and the CTU's definitional criteria, the auditor would interview the employee about the activity in question. After obtaining additional information through this interview, the auditor could then properly classify the activity as either chargeable or nonchargeable. *Id.* at 72-73. This procedure adequately ensured that CTU employees' descriptions of their job activities would comport with the definitions of collective bargaining contained in the fair share notice.

In their final challenge to the verification of salary expenses, plaintiffs suggest that the CTU should have required its employees to keep time reports of the hours they spent on various activities. Plaintiffs imply that without such time reports, the auditor could not have reliably verified the collective bargaining percentages calculated by CTU employees. Contrary to this assertion, plaintiffs' own accounting expert has testified that an adequate verification of these percentages need not include a review of time reports. If activity reports, expense records, and employee interviews reasonably substantiated an employee's collective bargaining percentage, the auditor would have no reason to seek additional information such as time reports. Deposi- **[1343]**tion of Kenneth C. McKendree, June 1, 1988, at 40-42. Thus, in the process of verification, the decision not to seek time reports falls within the reasonable range of discretion accorded to an auditor. In the case of the CTU's 1987-88 notice, the auditor elected not to request time reports, having already found sufficient evidence to support the percentages calculated by CTU employees. This court is in no position to second-guess

the auditor's professional judgment on this matter. Consequently, the court refuses to find that the auditor's failure to review time reports renders the CTU's notice constitutionally inadequate.[6]

Finally, plaintiffs claim that the notice confuses potential objectors into thinking that the auditor has endorsed the CTU's definitions of collective bargaining. On the contrary, the notice includes the auditor's signed statement that his verification of the allocation of expenses was "subject to the definitions, material factors and assumptions" adopted by the CTU. From this statement, a reasonably intelligent person could discern that the auditor had applied the CTU's definitions without necessarily endorsing them. Plaintiffs also complain more generally that the notice does not explain the verification procedure in laymen's terms. This court recognizes that a detailed document like the CTU's notice inevitably breeds some confusion among readers untrained in economics or accounting. Nonetheless, having reviewed the notice, the court does not find the document unduly confusing or incomprehensible. Considering the fact that they are literate, intelligent educators, plaintiffs and their nonunion coworkers in the bargaining unit should have little or no difficulty in reading the notice and gaining an understanding of the basis for the fair share fee.

Ultimately, plaintiffs' steady stream of pejorative rhetoric cannot obscure the fact that the CTU's 1987-88 fair share notice represents a marked improvement over its original fair share

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[6] Nonetheless, the court strongly encourages the CTU to institute a time reporting system for its employees. Although the auditor saw no need to consult time reports when he verified the 1987-88 notice, future audits may not go so smoothly. When examining the CTU's notice for a subsequent school year, the auditor may find that activity and expense reports and employee interviews do not satisfactorily answer all of his questions about a particular employee's collective bargaining percentage. Under those circumstances, the auditor may ask the CTU for supplemental information, including records of the time the employee spent on each activity. The CTU should be prepared for such a contingency.

scheme. In 1982, nonunion employees received only the most cursory "notice" of the CTU's fair share fee before the Board began deducting the fee from their paychecks. Without explaining how it calculated the fee, the CTU simply informed nonunion employees that their proportionate share of collective bargaining costs amounted to a certain percentage of union dues. In stark contrast, the CTU's 1987-88 notice discloses to nonunion employees the calculations and assumptions underlying the fair share fee. This notice includes all of the features required by the Supreme Court in *Hudson*. For instance, the notice breaks down the fee into its component parts, listing the CTU's major categories of expenses. The notice also reveals the CTU's method for calculating the fee, including the CTU's definition of collective bargaining. Furthermore, an independent auditor has verified that the CTU actually made the expenditures described in the notice. This verification incorporated the best format and the highest level of service offered by the accounting profession. Finally, and most importantly, the notice is serving its intended purpose within the *Hudson* procedural framework. Plaintiffs contend that their objections to the calculation of the fee illustrate the deficiency of the notice. On the contrary, these objections provide the best evidence that the notice is fulfilling its constitutionally appropriate role under *Hudson*: providing potential objectors with sufficient information to gauge the propriety of the fee. Taking all of these factors into consideration, this court concludes that the CTU has designed and promulgated a constitutionally adequate fair share notice. In light of this determination, the court sees no reason to maintain the federal escrow of the CTU's fair share funds.

[1344]CONCLUSION

For the foregoing reasons, this court grants the CTU's motion to release the fair share funds held in escrow. The court instructs the Clerk of the Court to release these funds to the CTU, along with all interest accrued on the funds. In addition, by agreement of the parties, the court directs the CTU to give plaintiffs a refund of all their 1986-87 fair share contributions.

Finally, this court orders the CTU to exempt plaintiffs from the deadline for filing fee objections under the CTU's internal appeal procedure. Pursuant to this procedure, plaintiffs shall receive a prompt opportunity to present their objections to the 1987-88 fee before an impartial decisionmaker. Pending resolution of the issues raised by plaintiffs, the CTU shall deposit all disputed fees in the escrow account it established as part of its internal objection procedure.

IT IS SO ORDERED.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

14 October 1987

BEST AVAILABLE COPY

[117 F.R.D. 413]

Annie Lee HUDSON, K. Celeste Campbell, Estherlene Holmes, Edna Rose McCoy, Dr. Debra Ann Petitan, Walter A. Sherrill, and Beverly F. Underwood, Plaintiffs,

v.

The CHICAGO TEACHERS UNION, LOCAL NO. 1; Robert M. Healey, Jacqueline B. Vaughn, Rochelle D. Hart, Thomas H. Reece, Glendis Hambrick, individually and as officers of the Chicago Teachers Union; the Board of Education of the City of Chicago, Illinois; Raoul Villalobos, Martha Jantho, Thomas Corcoran, Betty Bonow, Sol Brandzel, Clark Burrus, Leon Jackson, Rose Mary Janus, Dr. Wildred Reid, Myrna Salazar, Dr. Luis Salces, Viola Thomas, individually and as officers and members of the Board of Education of the City of Chicago, Illinois, Defendants.

No. 83 C 2619.

United States District Court,
N.D. Illinois, E.D.

Oct. 14, 1987.

* * * *

[414]ORDER

BUA, District Judge.

Plaintiffs in this case have moved for class certification. Originally, the motion was referred to Magistrate Joan H. Lefkow. On July 31, 1987, Magistrate Lefkow submitted a report to this court recommending certification of plaintiffs' proposed class for the purpose of notice, as well as certification of a subclass that would be eligible for monetary relief. After reviewing the magistrate's report *de novo* pursuant to Fed.R.Civ.P. 72(b), this court declines to adopt the magis-

trate's recommendation, and enters an order denying plaintiffs' motion.

FACTS

The Chicago Teachers Union ("CTU") serves as the exclusive bargaining agent for the City's teachers and certain other employees of the Chicago Board of Education. Under CTU's contract with the Board, all members of the bargaining unit who do not wish to join the union must pay CTU their proportionate share of the union's collective bargaining expenses.

Plaintiffs in this case are seven nonunion employees of the Board who belong to the bargaining unit represented by CTU. They objected to the union's procedure for determining the "proportionate share" payments of nonunion employees. Plaintiffs argued that the procedure violated the First Amendment by failing to guard against CTU's use of nonmembers' payments to support ideological causes that the nonmembers personally oppose. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

This court originally rejected plaintiffs' constitutional claims. 573 F.Supp. 1505 (N.D.Ill.1983). On appeal, however, the Seventh Circuit reversed. A three-judge panel concluded that CTU's procedure did not adequately safeguard the First Amendment rights of dissenting nonmembers, whose union contributions might be used to finance political causes of which they disapprove. 743 F.2d 1187 (7th Cir.1984). The United States Supreme Court affirmed the Seventh Circuit's ruling, and remanded the case to this court for determination of the appropriate remedy. 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

On remand, plaintiffs seek certification of a class consisting of all past, present, **[415]** and future Board employees who are not members of CTU, and who have made payments to CTU pursuant to the proportionate share payment plan for nonunion employees. The magistrate has recommended certification of

plaintiffs' proposed class, but only for the purpose of notifying class members of their right to receive information concerning CTU expenditures. The magistrate has also recommended certification of a subclass, consisting of those persons who raise objections after receiving notice and information. Under the magistrate's proposal, only those objecting class members could seek monetary relief.

DISCUSSION

The magistrate has prepared an exhaustive report discussing all the various facets of the law governing class actions. Ultimately, however, the decision to certify a class in this case hinges on a single issue: the type of relief that the class is seeking. In recommending certification, the magistrate characterized this litigation as a (b)(2) class action in which plaintiffs are requesting primarily injunctive or declaratory relief. *See* Fed.R.Civ.P. 23(b)(2). This court must respectfully disagree with the magistrate's characterization of this case.

Although this lawsuit may have commenced in a (b)(2) posture, injunctive relief is no longer the primary rationale underlying plaintiffs' motion for class certification. The Supreme Court has already granted the injunctive relief that plaintiffs initially sought. Under the fee-collection scheme mandated by the Court, all nonunion employees will receive "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 106 S.Ct. at 1078. Thus, regardless of whether a class is certified in this case, all prospective class members will benefit from a revised fee-collection procedure that more fully protects their First Amendment rights.

Consequently, the only reason to certify a class at this point would be to allow class members to seek money damages from CTU. Now that the primary purpose of the proposed class is the pursuit of money damages, this case is more accurately character-

ized as a (b)(3) class action. See Fed.R.Civ.P. 23(b)(3).[1] Perhaps in another factual setting, this litigation could proceed as a class action. In this case, however, both the Seventh Circuit and the Supreme Court have ruled on the merits of plaintiffs' claims. In a (b)(3) class action such as this case, Rule 23 requires class certification prior to a determination on the merits. *Roberts v. American Airlines, Inc.*, 526 F.2d 757, 763 (7th Cir.1975), *cert. denied*, 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 1353-54 (7th Cir.1975). This requirement prevents the inequitable practice of "one-way intervention," whereby a prospective plaintiff could avoid the binding effect of an adverse judgment against a class by waiting to see whether the class prevailed on the merits before joining the class himself. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547, 94 S.Ct. 756, 763, 38 L.Ed.2d 713 (1974); *Jimenez v. Weinberger*, 523 F.2d 689, 697-98 (7th Cir.1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3200, 49 L.Ed.2d 1204 (1976).

The previous adjudication of the merits of plaintiffs' claims precludes certification of a class whose members seek money damages. Acting in accordance with Rule 23, this court has no choice but to deny plaintiffs' motion for class certification.

CONCLUSION

For the foregoing reasons, this court declines to adopt the magistrate's report and recommendation, and enters an order denying plaintiffs' motion for class certification.

IT IS SO ORDERED.

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[1] Contrary to plaintiffs' contentions, class members would not be entitled to restitution of all fees that they paid under the constitutionally flawed procedure. Each individual class member could only recover that portion of his fees used to support political causes to which he objected. Thus, a monetary remedy in this case would entail precisely the sort of individualized claims for money damages that can only be maintained in a (b)(3) class action.

APPENDIX D

PETITIONERS' AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

14 May 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTHER-LENE HOLMES, EDNA ROSE McCOY, DR. DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD, Plaintiffs, v. THE CHICAGO TEACHERS UNION, LOCAL No. 1; ROBERT M. HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, GLENDIS HAMBRICK, individually and as officers of the Chicago Teachers Union; THE BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS; RAOUL VILLALOBOS, MARTHA JANTHO, THOMAS CORCORAN, BETTY BONOW, SOL BRANDZEL, CLARK BURRUS, LEON JACKSON, ROSE MARY JANUS, DR. WILFRED REID, MYRNA SALAZAR, DR. LUIS SALCES, VIOLA THOMAS, individually and as officers and members of the Board of Education of the City of Chicago, Illinois, Defendants.	)	No. 83 C 2619 JURY DEMANDED Judge Nicholas J. Bua

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

This is an action brought by employees of the Board of Education of the City of Chicago against the Board of Education of the City of Chicago and the Chicago Teachers Union, Local No. 1, asking for injunctive and declaratory relief, restitution, and monetary damages based upon claims that these defendants, acting [2]in concert, have deprived and are depriving plaintiffs of their rights protected by the First and Fourteenth Amendments to the United States Constitution.

II. JURISDICTION

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 to protect plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution; and pursuant to 28 U.S.C. § 1343 to provide remedies under 42 U.S.C. § 1983, declaratory relief under 28 U.S.C. §§ 2201-2202, and attorneys' fees under 42 U.S.C. § 1988.

III. PARTIES

3. All plaintiffs are now and at all times relevant hereto were citizens of Illinois employed by the defendant Board of Education of the City of Chicago. Plaintiffs are not members of the defendant Chicago Teachers Union, Local No. 1, or any of its affiliates.

4. Defendant Board of Education of the City of Chicago (hereinafter "School Board") is a body politic and corporate with the power to sue and be sued in its own name.

5. Defendants Raoul Villalobos, Martha Jantho, Thomas Corcoran, Betty Bonow, Sol Brandzel, Clark Burrus, Leon Jackson, Rose Mary Janus, Dr. Wilfred Reid, Myrna Salazar, Dr.

Luis Salces, and Viola Thomas (hereinafter "Board Members") are officers and members of the School Board, and are sued in their official and individual capacities.

[3] 6. Defendant Chicago Teachers Union, Local No. 1 (hereinafter "Local Union") is an unincorporated association and labor organization doing business in Illinois which is recognized by the defendant School Board as the exclusive bargaining representative of all full-time teachers employed by the School Board, including plaintiffs.

7. Defendants Robert M. Healey, Jacqueline B. Vaughn, Rochelle D. Hart, Thomas H. Reece, and Glendis Hambrick (hereinafter "Union Officers") are officers of the Local Union, and are sued in their representative and individual capacities.

IV. CLASS ACTION

8. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and all other persons who are now, have been, or will be employees of the School Board, who are not members of the Local Union, and who have had money deducted from their salaries by the School Board for payment to the Local Union pursuant to the terms of collective-bargaining agreements in effect between these defendants on and after 1 September 1982. The class is to be determined pursuant to Rule 23(c)(4)(A), and includes plaintiffs and all other persons who are now, have been, or will be [4]employees of the School Board, who are not members of the Local Union, and whose constitutionally protected rights to property and liberty have been violated by the taking of portions of their wages by the School Board, for the benefit of the Local Union, in violation of the class members' rights to due process of law.

The persons comprising this class are believed to be in excess of one thousand individuals, and are therefore so numerous that joinder of all members of the class is impractical. There are questions of law and fact common to the class. The claims of the

named plaintiffs are typical of the claims of the members of the class. And plaintiffs, as representatives of the class, will fairly and adequately protect the interests of the class.

Defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive, declaratory, restitutionary, and other equitable relief to the class as a whole. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members. And a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

V. OPERATIVE FACTS

9. Under color of Illinois law, including at various times Ill. Rev. Stat. ch. 122, § 10-22.40(a) (1983) and Ill. Stat. Ann. ch. 48, § 1701 (Smith-Hurd 1984 Supp.), the School Board and Local Union have entered into written collective-bargaining [5] agreements, effective on and after 1 September 1982, provisions of which purport: (i) to require all employees of the School Board who are not members of the Local Union (including the plaintiffs) to pay to the Local Union a fee supposedly measured by the employees' proportionate share of the Local Union's costs of collective bargaining and contract administration undertaken as their exclusive representative; and (ii) to require the School Board to deduct from those employees' wages the fees the Local Union demands.

10. By the terms of its agreements with the Local Union and in actual practice, the School Board has retained no authority or duty to participate in or to review the determination of the amount of money to be deducted as collective-bargaining fees from the wages of the plaintiffs and its other non-union employees.

11. By the terms of its agreements with the Local Union, upon receipt of an appropriate demand from and by the Local Union, the School Board must deduct from the wages of the

plaintiffs and its other non-member employees amounts equal to those claimed in the demand to be the non-members' proportionate share of the cost of collective bargaining and contract administration.

12. Plaintiffs have objected, and continue to object, to the use by the Local Union of any of their money for any purpose not directly related to either the cost of collective bargaining incurred by the Local Union acting as the exclusive representative for plaintiffs, or the cost of administering the [6]collective-bargaining agreement in effect between the School Board and Local Union; and have objected, and continue to object, to the procedure by which the Local Union has obtained, and threatens to obtain, possession of that money.

13. Commencing on or about 17 December 1982, the School Board began and thereafter continued, without the consent of any plaintiff, to withhold sums of money, equal to amounts demanded by the Local Union, from the monthly wages of plaintiffs.

14. On information and belief, the entire sums of money demanded by the Local Union and withheld from plaintiffs' wages by the School Board were, and continue to be, transferred directly to the Local Union.

VI. CLAIM FOR RELIEF

15. Plaintiffs reallege and incorporate by reference herein all allegations set forth in paragraphs 1 through 14.

16. The School Board, acting under color of the laws of Illinois and in concert with the Local Union, by and through their agents the Board Members and Union Officers, wrongfully, intentionally, maliciously, and with wanton disregard for the civil rights of plaintiffs, conspired to deprive, did deprive, and continues to deprive plaintiffs of their right to due process of law, which right is secured by the First and Fourteenth Amendments

to the Constitution of the United States, by entering into and enforcing the provisions of collective-bargaining agreements described in paragraphs 9 through 11 of this amended [7]into and enforcing the provisions of collective-bargaining agreements described in paragraphs 9 through 11 of this amended complaint.

17. The School Board's agreement to enforce and its enforcement of the aforesaid provisions of its collective-bargaining agreements with the Local Union violate plaintiffs' rights to due process of law as secured by the First and Fourteenth Amendments to the United States Constitution because those provisions:

A. require the School Board, solely upon demand by the Local Union, to deduct from plaintiffs' wages money to which plaintiffs are entitled by the laws of Illinois and of the United States, and to make said deductions without requiring the Local Union or the School Board to give prior notice to plaintiffs as to the actual and legal bases for such demand; without giving plaintiffs an opportunity to challenge the Local Union's claim to entitlement before an impartial decision-maker; and without requiring the Local Union to show, prior to the deductions and by clear evidence, that said monies are equal to the non-member employees' pro rata share of the Local Union's cost of collective bargaining and contract administration with the School Board; and

[8] B. require the School Board to make said deductions in the absence of any standards, guidelines, or procedures that meaningfully protect plaintiffs' and other non-union-member employees' property and liberty rights; and without the availability of any review of the Local Union's demand, either before or after the execution of the taking, that meaningfully protects plaintiffs' and other similarly situated employees' rights to freedom of expression and association and right to be secure in their property.

VII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

A. Issue a declaratory judgment pursuant to 28 U.S.C. § 2201 that all provisions of collective-bargaining agreements between the Local Union and the School Board entered into as of and after 1 September 1982 that mandate collection of fees from the plaintiffs and other similarly situated employees, as described in paragraphs 9 through 11 of this amended complaint, are void and unenforceable because they violate plaintiffs' rights to freedom of expression and association and their right to due process of law as these rights are secured by the First and Fourteenth Amendments to the United States Constitution, enforceable through 42 U.S.C. § 1983.

[9] B. Order injunctive relief preliminarily and permanently enjoining and restraining the School Board from:

(1) enforcing any of the aforesaid automatic wage-deduction provisions of the said collective-bargaining agreements between the Local Union and School Board; and

(2) requiring plaintiffs to pay any amount of money to the Local Union in violation of their rights to freedom of expression and association and due process of law.

C. Order injunctive relief preliminary and permanently enjoining and restraining the Local Union from enforcing or attempting to enforce any of the aforesaid wage-deduction provisions of the collective-bargaining agreements between the School Board and Local Union.

D. Order mandatory injunctive relief to require the School Board and Local Union to restore to plaintiffs all monies deducted from their wages pursuant to the terms of the aforesaid provisions of the collective-bargaining

agreements between the School Board and Local Union.

E. Award damages to plaintiffs based on the School Board's, Board Members', Local Union's, and Union Officers' conspiracy and other intentional actions in deprivation of plaintiffs' constitutionally secured liberty and property rights.

[10] F. Award exemplary damges to plaintiffs in the amount of $1,000,000 jointly and severally against the School Board, Board Members, Local Union, and Union Officers based upon their intentional and malicious acts in wanton disregard for the civil rights of plaintiffs.

G. Award plaintiffs reasonable attorneys' fees pursuant to 42 U.S.C. § 1988, together with the costs of this suit.

H. Award such other and additional relief as the Court deems just and appropriate.

Respectfully submitted,

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APPENDIX E

CHICAGO TEACHERS UNION, LOCAL NO. 1, 1987-1988 FAIR-SHARE FEE NOTICE ("FSN-3")

NOTICE TO EMPLOYEES

FROM THE

Illinois Educational Labor Relations Board

YOUR EMPLOYER The Board of Education of the City of Chicago **AND YOUR EXCLUSIVE BARGAINING REPRESENTATIVE** Chicago Teachers Union, Local No. 1 **HAVE AGREED TO A COLLECTIVE BARGAINING AGREEMENT FOR THE PERIOD** September 1, 1987 **TO** August 31, 1989 **WHICH PROVIDES THAT THOSE BARGAINING UNIT EMPLOYEES WHO ARE NOT MEMBERS OF THE EXCLUSIVE REPRESENTATIVE MUST PAY A "FAIR SHARE" FEE FOR SERVICES RENDERED BY THE REPRESENTATIVE.**

(Name of Employer)

(Name of Union)

FOR THE 1987-88 SCHOOL YEAR:

THE "FAIR SHARE FEE IS $* _____ AND PAYROLL DEDUCTIONS WILL BEGIN ON * _____. THE "FAIR SHARE" FEE WAS CALCULATED IN THE FOLLOWING MANNER:

		ANNUAL	MONTHLY
*	TEACHERS 12/23/87	$ 294.13	$ 42.01 **
	CAREER SERVICE EMPLOYEES 12/18/87	$ 176.47	$ 22.05 **

See the attached statement showing major categories of expenses and attached statements by independent auditors showing expenditures on which fair share fee is based.

NON-MEMBERS HAVE THE RIGHT, UNDER THE ILLINOIS EDUCATIONAL LABOR RELATIONS ACT, TO OBJECT TO THE AMOUNT OF THE FEE AND MAY DO SO BY FILING WITH THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, 325 WEST ADAMS, 4th FLOOR, SPRINGFIELD, ILLINOIS 62706 OR 20 N. Wacker Drive, SUITE 1000, CHICAGO, ILLINOIS 60606. THE NECESSARY FORMS AND OTHER ADDITIONAL INFORMATION ARE AVAILABLE FROM THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD.

ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD

an agency of the ** There will be 8 deductions for Career Service and 7 deductions for Teachers.

STATE OF ILLINOIS

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE

NOTICE TO EMPLOYEES
FROM THE
Illinois Educational Labor Relations Board

On or about November 25, 1987 the Chicago Teachers Union posted and served a notice from the Illinois Educational Labor Relations Board to all fair share fee payers that their fair share fee deductions would begin on December 18, 1987 for career service employees and December 23, 1987 for teachers. This was based upon the Union's reasonable expectation that the Chicago School Finance Authority (SFA) would have approved the Board-Union Agreement providing for the fair share fee deductions during its hearing on December 16, 1987.

You may have noticed that the paychecks issued on December 18 and 23, 1987 did not have any deductions for fair share fees. The reason for this is that the Board of Education failed to provide the SFA with the financial information required by the SFA to act upon the Board-Union agreement in time for its December 16 meeting. Accordingly, the SFA has rescheduled the meeting to January 8, 1988, thereby postponing the date for deducting fair share fees. However, in an effort to carry out the original schedule of deductions, the Union requested the Board of Education to extend the fair share fee provisions of the past collective bargaining agreement. That extension agreement was rejected by the Board of Education.

These actions by the Board of Education will delay the collection of fair share fees and ALTHOUGH THE ANNUAL FEE REMAINS THE SAME the period of collection will be reduced, causing a reduced number of deductions and therefore, causing each deduction to be higher than set forth in the original notice.

Assuming SFA approves the tentative collective bargaining agreement on or shortly after January 8, 1988, fair share fee deductions will be as follows:

		Annual	Monthly
Teachers	1/22/88	$294.13	$49.02 (6 deductions)
Career service employees	1/29/88	$176.47	$29.41 (6 deductions)

The Union regrets this delay and any inconvenience this may cause.

NON-MEMBERS HAVE THE RIGHT, UNDER THE ILLINOIS EDUCATIONAL LABOR RELATIONS ACT, TO OBJECT TO THE AMOUNT OF THE FEE AND MAY DO SO BY FILING WITH THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD, 320 WEST WASHINGTON, 2ND FLOOR, SPRINGFIELD, ILLINOIS 62706 OR 20 N. Wacker Drive SUITE 1000 CHICAGO, ILLINOIS 60606. THE NECESSARY FORMS AND OTHER ADDITIONAL INFORMATION ARE AVAILABLE FROM THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD. ALSO, NON-MEMBERS WHO OBJECT TO PAYMENT OF A FAIR SHARE BECAUSE OF BONAFIDE RELIGIOUS TENETS OR TEACHING OF A CHURCH OR RELIGIOUS BODY OF WHICH SUCH EMPLOYEES ARE MEMBERS MAY PAY AN AMOUNT EQUAL TO THEIR FAIR SHARE FEE TO A NON-RELIGIOUS CHARITABLE ORGANIZATION AS PROVIDED IN SECTION 11 OF THE ACT.

ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD

an agency of the

STATE OF ILLINOIS

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE.

[Portion of letterhead omitted in printing.]

CHICAGO
TEACHERS
UNION

BY MESSENGER

November 20, 1987

Dr. Frank Gardner, President
Chicago Board of Education
1819 West Pershing Road
Chicago, Illinois 60609

Re: Certification of the 1987-88 Fair Share Fee

Dear Dr. Gardner:

The Chicago Teachers Union certifies that the dues required of Union members and the fair share fee to be deducted from earnings of nonmembers during the 1987-88 school year is as follows:

	TEACHERS		CAREER SERVICE	
	Annual	Monthly	Annual	Monthly
Dues:	$346.04	$34.60 (10 mo.)	$207.62	$20.76 (10 mo.)
Fees:	$294.13	$42.01 (7 mo.)	$176.47	$22.05 (8 mo.)

The annual fees will be prorated over the balance of the school year from the first deduction.

The Union has again engaged Bansley and Kiener, certified public accountants, to audit its financial records for the fiscal year ended June 30, 1987, and to determine the amount of expenditures chargeable and non-chargeable to fee payers in accord with federal and state law -- that is, the amount devoted to services such as collective bargaining, contract administration, and pursuit

of matters affecting terms and conditions of employment. They determined the maximum fair share percentage to be 85.84%, which the Union rounded down to 85% in setting the fee.

Enclosed herewith is a copy of the "Notice to Employees from the Illinois Educational Labor Relations Board" and attachments containing notice of the amount and basis of the 1987-88 fair share fee and notice of the methods available for challenging the fee. The attachments include auditors' statements setting forth the expenditures of the Chicago Teachers Union and the portion forming the basis of the fair share fee, a list of major categories of expenses, similar auditors' statements for the Illinois Federation of Teachers and the American [2]Federation of Teachers, and a Revised Internal Union Appeal Procedure. The Notice and attachments will be posted on the CTU bulletin boards in the schools by November 25, and they are being distributed to nonmember fee payers. Notice will also appear in the December issue of the Chicago Union Teacher, which is distributed to all bargaining unit personnel.

The Chicago Teachers Union has taken the action set forth above, and certifies it to you, in order to comply with Section 11 of the Illinois Educational Labor Relations Act, the Fair Share Fee Objections Rules of the Educational Labor Relations Board, and Section 1-8.2 of the 1987-89 Board/Union agreement in the manner required by the Supreme Court's decision in Chicago Teachers Union v. Hudson. We believe that the Notice and this certification accomplish those purposes.

Sincerely,

/s/

JACQUELINE B. VAUGHN
President

cc: Dr. Manford Byrd
Patricia J. Whitten
Richard Tygielski

opeiu-28-dit
WPP16(1-2)

Subscribed and Sworn to before me
This____day of_____, 1987.

_____
NOTARY PUBLIC

ATTACHMENT

CHICAGO TEACHERS UNION

NOTICE TO FAIR SHARE FEE PAYERS

The agreement between the Chicago Teachers Union and the Board of Education provides that employees represented by, but not members of, the Union will pay their fair share of the cost of services rendered by the Union.

1. The Reason For Fair Share Fees

Your fair share fees and Union dues paid by members provide the means whereby the Union, representing you and all of your fellow employees, can effectively protect and advance your economic and professional interests. One of the most valuable of those services is negotiation of the contract that governs your earnings, other economic benefits and the conditions under which you work. Collective bargaining and protecting employees' rights under the contract require year-round activity by the Union officers and staff, attorneys and consultants, and hundreds of volunteer Union members. Further, since many of your working conditions and benefits, as well as the resources available to fund school operations, are governed by legislation, the Union monitors the legislative process and lobbies in your interest on these matters through its Legislative Director, Union volunteers, and affiliated organizations. Fair share fees and Union dues pay the costs of all these activities, including the staff work and the legal, economic and educational research necessary to develop the Union's program in your behalf.

The principle that nonmembers should pay their fair share of obtaining and maintaining the benefits of the Union's representational activities has been upheld by the Supreme Court and has been enacted into state law. At the same time, the law provides that nonmembers may not be compelled to contribute [2]to political and ideological activities not related to negotiations, contract administration, or pursuit of matters affecting conditions of employment.

2. The Basis of the 1987-88 Fair Share Fee

Attached to this notice are the auditors' statement of general fund expenses and the allocation of expenses between chargeable and non-chargeable expenses, and the Union's itemization of its major categories of expenses in percentage terms. (Similar statements from AFT and IFT auditors are attached. Payments to other affiliates which did not provide auditors' statements have been excluded from the fee, even though those affiliations advance your interests both at the bargaining table and in the legislature.)

The auditors have determined that in the last fiscal year 85.84% of all expenditures made from dues and fees related to the categories of activities deemed chargeable to fair share fee payers. (As in past years, direct contributions to support political candidates have been made from a fund separate from the Union's general fund and maintained solely by voluntary contributions.) The Union rounded the percentage down and set fair share fees for the 1987-88 year at 85% of dues:

	TEACHERS		CAREER SERVICE	
	Annual	Monthly	Annual	Monthly
Dues	346.04	36.40 (10 mo.)	207.62	20.76 (10 mo.)
Fees	294.13	42.01 (7 mo.)	176.47	22.05 (8 mo.)

This notice could not be made until now due to the lengthy strike and the time necessary to accurately make these calculations. Accordingly the annual fee will be payable over the remaining 7 deductions for teachers and 8 deductions for career service.

[3] 3. Procedures for Contesting the Fee

Fee payers may object to the amount of the fee by filing an objection with the Illinois Educational Labor Relations Board (as explained in the attached Labor Board Notice), or by asserting an objection in a letter to the President of the Union invoking the

Union's Internal Appeal Procedure, or by seeking a remedy in a court of law.

A copy of the 1987-88 Union's Internal Appeal Procedure, revised to provide a more prompt determination, is attached. Copies have been posted on employee bulletin boards and can be obtained either from the school delegate or by writing to the Union office (address and phone number below).

/s/
JACQUELINE B. VAUGHN, President
Chicago Teachers Union
201 N. Wells Street, Ninth Floor
Chicago, Illinois 60606
346-1823

opeiu-28-dit

CHICAGO TEACHERS UNION

STATEMENT OF GENERAL FUND EXPENSES AND ALLOCATION OF EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE EXPENSES

YEAR ENDED JUNE 30, 1987

BANSLEY AND KIENER
CERTIFIED PUBLIC ACCOUNTANTS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
AREA CODE 312 263-2700

Chicago Teachers Union
Chicago, Illinois

We have examined the statement of General Fund expenses and allocation of expenses between chargeable and non-chargeable expenses of the Chicago Teachers Union for the year ended June 30, 1987. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. We have examined the financial statements of the Chicago Teachers Union for the year ended June 30, 1987, and have issued our report thereon dated September 30, 1987.

The expenses reflected in Column A, as modified for the accounts described in the first paragraph of Note 1, are based on our audit report for the year ended June 30, 1987. The allocation of expenses between Chargeable (Column B) and Non-chargeable (Column C) are based on the significant factors and assumptions described in Note 2.

In our opinion, the statement of General Fund expenses and allocation of expenses between chargeable and non-chargeable expenses, present fairly the expenses of the Chicago Teachers Union for the year ended June 30, 1987 and the allocated expenses between chargeable and non-chargeable expenses, based on the significant factors and assumptions described in Note 2.

/s/ Bansley and Kiener
Certified Public Accountants

November 13, 1987

CHICAGO TEACHERS UNION

STATEMENT OF GENERAL FUND EXPENSES AND ALLOCATION OF EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE EXPENSES YEAR ENDED JUNE 30, 1987

Directly Allocable Expenses	Column A Total	Column B Chargeable	Column C Non-chargeable
Affiliation fees	$3,150,924	$2,783,460	$367,464(A)
Salaries	1,040,047	994,770	45,277(B)
Employee benefits	551,341	525,626	25,715(C)
Travel and other employee expenses	251,192	238,827	12,365(C)
Legislative	21,264	19,618	1,646(C)
Rent and utilities	237,492	226,757	10,735(D)
Telephone	32,411	30,946	1,465(D)
Depreciation and amortization	127,842	122,064	5,778(D)
Collective bargaining	43,715	43,715	- (E)
Contract administration, including legal matters	294,385	294,385	- (E)

[Continued]

[Directly Allocable Expenses]	[Column A Total]	[Column B Chargeable]	[Column C Non-chargeable]
Newspaper	144,727	112,598	32,129(F)
Other communication expenses	21,817	21,817	- (F)
Executive board	22,295	20,957	1,338(G)
Meetings	128,654	88,054	40,600(G)
Convention expenses	187,614	187,614	- (H)
Professional fees	50,974	50,974	- (H)
Public relations	75,402	-	75,402(I)
Members only benefits	330,281	-	330,281(J)
	6,712,377	5,762,182	950,195

[Continued]

[Directly Allocable Expenses]	[Column A Total]	[Column B Chargeable]	[Column C Non-chargeable]
Other Expenses			
Office supplies and expense	192,725		
Insurance	26,876		
Interest expense	83,471		
Miscellaneous	14,722		
	317,794	272,795	44,999(K)
Totals	$7,030,171	$6,034,977	$995,194
	100.00%	85.84%	14.16%

The accompanying notes are an integral part of this statement.

CHICAGO TEACHERS UNION

NOTES TO STATEMENT OF GENERAL FUND EXPENSES AND ALLOCATION OF EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE EXPENSES

Note 1 - Summary of Significant Accounting Policies

Accounts Included in the Statement

The statement includes the General Fund expenses which at present encompasses all of the expenses of the Chicago Teachers Union ("Union") for the year ended June 30, 1987 net of assistance and reimbursements from affiliated organizations.

Method of Accounting

The Union prepares its financial statements utilizing the accrual basis of accounting.

Income Taxes

The Union is exempt from federal income taxes under Section 501(c)(5) of the Internal Revenue Code.

Employee Benefit Plans

The Union has employee benefit plans that cover all eligible employees. Contributions are based on a percentage of the eligible employees' salaries.

Severance and Sick Pay

The Union accrues accumulated severance and sick pay as it is earned by its employees under various contracts and agreements.

Depreciation

Depreciation of property and equipment is computed on the straight-line method. Leasehold improvements are amortized on the straight-line method over the shorter of the estimated useful lives of the improvements or the terms of the related lease.

Leases

The Union leases office space in Chicago, Illinois. In addition, the Union leases office equipment under capital lease arrangements. The assets under these arrangements are recorded at the lower of the present value of the minimum lease payments or the fair value of the asset. The assets are depreciated over the lower of their related lease terms or estimated productive lives.

[2] Note 2 - Definitions, Material Factors and Assumptions Used in the Allocation of Expenses between Chargeable and Non-chargeable Expenses

Definitions

Chargeable expenses are those incurred by the Union that reflect the nonmembers' proportionate share of the costs of services rendered by the Union, necessarily and reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues, including the costs of: negotiating and administering the collective bargaining contract; settling grievances and disputes by mutual agreement, or in arbitration, court or otherwise; activities and undertakings normally and reasonably employed to implement the duties of the Union as exclusive representative of the employees

in the bargaining unit; and the maintenance of the Union's associational existence. The following are examples of expenditures classified as chargeable: preparation for and negotiations of collective bargaining agreements with the Chicago Board of Education; contract administration including investigation and processing grievances; meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work related subjects and issues; handling work related problems of employees; communications with community organizations, civic groups, government agencies and the media respecting the Union's position on work related matters; lobbying and legislative activities with respect to matters concerning employees' work related issues; maintaining membership and recruitment of Board employees; employee group programs; and providing legal, economic and technical expertise in behalf of employees in all matters relating to work related matters.

Non-chargeable expenses are those of an ideological or political nature and those that are not germane to work related interests of employees. The following are examples of expenditures classified as non-chargeable: costs of affiliation with labor organizations which do not allocate chargeable expenditures; expenditures (direct and indirect) for political activities, including the support of political candidates and political organizations; ideological causes and international affairs; charitable contributions; members-only benefits; and that portion of expenditures for Union administration costs, newspaper publication, affiliation fees, lobbying and other matters, that are not germane to work related interests of employees.

Material Factors and Assumptions

(A) Affiliation Fees

Affiliation fees were allocated between chargeable and non-chargeable based on reports submitted to the Union by the affiliated organizations. Those affiliated organizations which did not submit a report were determined to be 100 percent non-chargeable.

[3] **[Restatement of note 2 heading omitted in printing]**

(B) Salaries

Salaries of the officers and field staff have been allocated between chargeable and non-chargeable based on review of the Union's records for these employees, intereviews with the employees and a review of the employees own personal records. Those office staff who report directly to officers and/or field staff were allocated between chargeable and non-chargeable in the same percentages as the person to whom they report. All other office staff were deemed to be 100 percent chargeable based upon review of their duties with management.

(C) Employee Benefits
Travel and Other Employee Expenses
Legislative Expense

These expenses have been allocated on the basis of the salary expense allocations detailed in (B) above.

(D) Rent and Utilities
Telephone
Depreciation and Amortization

These expenses have been allocated between chargeable and non-chargeable based on the average

percentages of the employees staffing the Union office.

(E) Collective Bargaining
Contract Administration, Including Legal Matters

These categories of expenses include the net amounts incurred for negotiating and administering the collective bargaining contract and for amounts paid to law firms for arbitration of grievances, administrative hearings and litigation. These expenses have been determined to be 100 percent chargeable.

(F) Newspaper
Other Communication Expenses

The direct costs of producing the newspaper were allocated between chargeable and non-chargeable based on a verification of the content analysis of the newspaper that was performed by the editor.

Other communication expenses include the production costs of other types of materials used by the Union in its activities and contact with the media. These expenses were determined to be 100 percent chargeable.

(G) Executive Board
Meetings

These expenses were allocated between chargeable and non-chargeable based on a verification of an analysis of the minutes of these meetings that was performed by the recording secretary.

[4] [Restatement of note 2 heading omitted in printing]

(H) Convention Expenses
Professional Fees

These expenses were determined to be 100 percent chargeable based on an analysis of the content of these expense classifications.

(I) Public Relations

These expenses were determined to be 100 percent non-chargeable.

(J) Members Only Benefits

This category consists of the amounts paid to the American Federation of Teachers for liability insurance, death benefits paid and the cost of producing the newsletter. These items were determined to be 100 percent non-chargeable.

(K) Office Supplies and Expense
Insurance
Interest Expense
Miscellaneous Expense

These expenses have been allocated as chargeable based on the ratio of the chargeable directly allocable expenses (Column B) to the total directly allocable expenses (Column A). Similarly, these expenses have been allocated as non-chargeable based on the ratio of the non-chargeable directly allocable expenses (Column C) to the total directly allocable expenses (Column A).

[5] VERIFICATION

I, Paul A. Merkel, a partner in the firm of Bansley and Kiener, hereby swear that the allocation of chargeable and non-chargeable expenses made in the report of Bansley and Kiener, to the Chicago Teachers Union, dated November 13, 1987 is accurate to the best of my knowledge and belief, subject to the definitions, material factors and assumptions set forth in that report.

/s/
PAUL A. MERKEL

SIGNED AND SWORN
to this 19th day
of November, 1987.

/s/ Shirley M. Duray
NOTARY PUBLIC

CHICAGO TEACHERS UNION
MAJOR CATEGORIES OF EXPENSES
JULY 1, 1986 - JUNE 30, 1987

The following is offered to provide the reader with an overview of CTU's categories of expenses, set forth in percentage terms. The Union has derived these percentages from its annual audit, its C.P.A.'s special report on fair share fees and a review and analysis of officers' and staff duties and activities. The actual dollar amounts, and the allocation thereof between chargeable and nonchargeable expenses, along with the basis for such allocation, appear more fully in the accompanying special report of Bansley and Kiener, Certified Public Accountants.

CHARGEABLE EXPENSES:

CTU Direct Expenses on Contract Administration (Includes officers' and staff salaries and benefits and travel expenses in connection with school meetings, grievance handling, arbitrations and court proceedings).	11.26
CTU Direct Expenses on Contract Negotiation (Includes officers' and staff salaries and benefits, travel, PPC expenses and related expenses in connection with preparing for and participating in contract negotiations).	4.30
CTU Direct Expenses on Legislative Activities (Includes officers' and staff salaries and benefits and travel expenses in connection with lobbying and legislative activities with respect to matters concerning employees' work related issues).	.95
CTU Expenses For Legal And Accounting Services (Accounting and legal services in connection with collective bargaining, contract administration and Union administration).	4.91

CTU Communication Expenses (Includes Chicago Union Teacher, calendar date books, newsletters and related expenses).	2.48
CTU Meetings and Related Expenses (Includes room and equipment rental, travel and related expenses in connection with meetings of the executive board, house of delegates and standing committees.)	3.32
CTU Workshops and Professional Seminar Expenses (Includes officers' and staff salaries and benefits, room rental, travel and related expenses).	.20
[2]CTU Convention Expenses (Includes delegates' salaries and benefits, room rental, travel and related expenses in connection with attendance and participation in AFT and IFT conventions).	2.69
CTU Office and Related Expenses (Includes officers' and staff salaries and benefits in connection with office administration, utilities, printing other than communication expenses, office equipment maintenance and depreciation).	15.11
Interest Expense	1.02
AFT Chargeable Expenses (See AFT statement of chargeable and non-chargeable expenses).	17.76
IFT Chargeable Expenses (See IFT statement of chargeable and non-chargeable expenses).	21.84

NON-CHARGEABLE EXPENSES: (Political and ideological expenses, including the non-chargeable portion of officers' and staff salaries and related expenses, communications, meetings, office and related expenses; per capita payments to ISFL and CFL; the nonchargeable portion of AFT and IFT per capita payments; and the cost of member only benefits.	14.16
	100%

To All Fee Payers:

Please feel free to direct any specific inquiry to your delegate or in writing to: Thomas H. Reece, Vice-President, Chicago Teachers Union, 201 North Wells Street, Chicago, Illinois 60606.

ILLINOIS FEDERATION OF TEACHERS

STATEMENT OF GENERAL FUND EXPENSES AND ALLOCATION OF EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE EXPENSES

YEAR ENDED DECEMBER 31, 1986

BANSLEY AND KIENER
CERTIFIED PUBLIC ACCOUNTANTS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
AREA CODE 312 263-2700

Illinois Federation of Teachers
Oak Brook, Illinois

We have examined the statement of General Fund expenses and allocation of expenses between chargeable and non-chargeable expenses of the Illinois Federation of Teachers for the year ended December 31, 1986. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. We have examined the financial statements of the Illinois Federation of Teachers for the year ended December 31, 1986, and have issued our report thereon dated March 4, 1987.

The expenses reflected in Column A are based on our audit report for the year ended December 31, 1986. The allocation of expenses between Chargeable (Column B) and Non-chargeable (Column C) are based on the significant factors and assumptions described in Note 2.

In our opinion, the statement of General Fund expenses and allocation of expenses between chargeable and non-chargeable expenses, present fairly the expenses of the Illinois Federation of Teachers for the year ended December 31, 1986 and the allocated expenses between chargeable and non-chargeable expenses, based on the significant factors and assumptions described in Note 2.

/s/ Bansley and Kiener
Certified Public Accountants

August 10, 1987

ILLINOIS FEDERATION OF TEACHERS

STATEMENT OF GENERAL FUND EXPENSES AND ALLOCATION OF EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE EXPENSES YEAR ENDED DECEMBER 31, 1986

Directly Allocable Expenses	Column A Total	Column B Chargeable	Column C Non-chargeable
Collective bargaining assistance to local unions	$ 109,442	$ 109,442	$ - (A)
Contract administration, including legal matters	425,234	425,234	- (A)
Salaries			
Field staff	986,771	954,267	32,504(B)
Officers	111,690	106,230	5,460(B)
Staff assistants	241,890	210,246	31,644(B)
Office staff	203,876	195,657	8,219(B)
Employee benefits	379,565	358,653	20,912(C)

[Continued]

[Directly Allocable Expenses]	[Column A Total]	[Column B Chargeable]	[Column C Non-chargeable]
Payroll taxes	107,283	102,243	5,040(C)
Travel and other employee expenses	385,665	364,806	20,859(C)
Severance pay	55,450	53,167	2,283(C)
Rent and utilities	146,170	136,196	9,974(D)
Telephone	74,592	68,762	5,830(D)
Depreciation and amortization	36,292	33,651	2,641(D)
Executive board	52,272	52,272	-
Convention expenses	43,653	43,653	-
Committee expenses	24,283	24,283	-
Professional fees	11,675	11,675	-
Newspaper	80,664	56,061	24,603(E)
Other communication expenses	50,754	50,754	- (E)
	3,527,221	3,357,252	169,969

[Continued]

[Directly Allocable Expenses]	[Column A Total]	[Column B Chargeable]	[Column C Non-chargeable]
Other Expenses			
Office supplies and expense	113,850		
Insurance	16,859		
Interest expense	21,227		
Miscellaneous	7,490		
	159,426	151,742	7,684(F)
Totals	$3,686,647	$3,508,994	177,653
	100.00%	95.18%	4.82%

The accompanying notes are an integral part of this statement.

ILLINOIS FEDERATION OF TEACHERS

NOTES TO STATEMENT OF GENERAL FUND EXPENSES AND ALLOCATION OF EXPENSES BETWEEN CHARGEABLE AND NON-CHARGEABLE EXPENSES

Note 1 - Summary of Significant Accounting Policies

Accounts Included in the Statement

The statement includes the General Fund expenses which at present encompasses all of the expenses of the Illinois Federation of Teachers ("Federation") for the year ended December 31, 1986.

Method of Accounting

The Federation prepares its financial statements utilizing the accrual basis of accounting.

Income Taxes

The Federation is exempt from federal income taxes under Section 501(c)(5) of the Internal Revenue Code.

Employee Benefit Plans

The Federation has employee benefit plans that cover all eligible employees. Contributions are based on a percentage of the eligible employees' salaries.

Severance Pay

The Federation accrues accumulated severance pay as it is earned by its employees under various contracts and agreements.

Depreciation

Depreciation of property and equipment is computed on the straight-line method. Leasehold improvements are amortized on the straight-line method over the shorter of the estimated useful lives of the improvements or the terms of the related lease.

Leases

The Federation leases office space in various locations throughout Illinois.

[2]Note 2 - Definitions, Material Factors and Assumptions Used in the Allocation of Expenses between Chargeable and Non-chargeable Expenses

Definitions

Chargeable expenses are those incurred by the Federation that reflect the nonmembers' proportionate share of the costs of services rendered by the Federation, necessarily and reasonably incurred for the purpose of assisting local unions and councils in the performance of their duties as an exclusive representative of the employees in dealing with the employer on labor management issues, including the costs of: negotiating and administering the collective bargaining contract; settling grievances and disputes by mutual agreement, or in arbitration, court or otherwise; activities and undertakings normally and reasonably employed to implement the duties of the local union or council as exclusive representative of the employees in the bargaining unit; and the maintenance of the Federation's, local union's and council's associational existence. The following are examples of expenditures classified as chargeable: preparation for and negotiations of

collective bargaining agreements; contract administration including investigation and processing grievances; meetings, conferences, administrative, arbitral and court proceedings and pertinent investigation and research in connection with work related subjects and issues; handling work related problems of employees; communications with community organizations, civic groups, government agencies and the media respecting the Federation's position on work related matters; lobbying and legislative activities with respect to matters concerning employees' work related issues; maintaining membership and recruitment of employees; employee group programs; and providing legal, economic and technical expertise in behalf of employees in all matters relating to work related matters.

Non-chargeable expenses are those of an ideological or political nature and those that are not germane to work related interests of employees. The following are examples of expenditures classified as non-chargeable: costs of affiliation with labor organizations which do not allocate chargeable expenditures; expenditures (direct and indirect) for political activities, including the support of political candidates and political organizations; ideological causes and international affairs; charitable contributions; members-only benefits; and that portion of expenditures for Federation administration costs, newspaper publication, affiliation fees, lobbying and other matters, that are not germane to work related interests of employees.

Material Factors and Assumptions

(A) Collective Bargaining Assistance to Local Unions Contract Administration, Including Legal Matters

These categories of expenses include the net amounts incurred for assistance to local unions and for amounts paid to law firms for arbitration of grievances, administrative hearings and litigation. These expenses have been determined to be 100 percent chargeable.

[3]Restatement of note 2 heading omitted in printing.]

(B) Salaries

Salaries of the field staff have been allocated between chargeable and non-chargeable based on review of the Federation's time records for these employees. Salaries of the officers and staff assistants were allocated based upon analyses of duties prepared by each of these employees. Those office staff who report directly to officers and/or staff assistants were allocated between chargeable and non-chargeable in the same percentages as the person to whom they report. All other office staff were deemed to be 100 percent chargeable based upon review of their duties with management.

(C) Employee Benefits
Payroll Taxes
Travel and Other Employee Expenses
Severance Pay

These expenses have been allocated on the basis of the salary expense allocations detailed in (B) above.

(D) Rent and Utilities
Telephone
Depreciation and Amortization

These expenses have been allocated between chargeable and non-chargeable based on the average percentages of those individuals who staff the various offices.

(E) Newspaper
Other Communication Expenses

The direct costs of producing the newspaper were allocated between chargeable and non-chargeable based on a verification of the content analysis of the newspaper that was performed by the assistant editor.

Other communication expense includes the production costs of other types of materials used by the Federation in its activities and contact with the media. These expenses were determined to be 100 percent chargeable.

(F) Office Supplies and Expense
Insurance
Interest Expense
Miscellaneous Expense

These expenses have been allocated as chargeable based on the ratio of the chargeable directly allocable expenses (Column B) to the total directly allocable expenses (Column A). Similarly, these expenses have been allocated as non-chargeable based on the ratio of the non-chargeable directly allocable expenses (Column C) to the total directly allocable expenses (Column A).

VERIFICATION

I, Paul A. Merkel, a partner in the firm of Bansley and Kiener, hereby swear that the allocation of chargeable and non-chargeable expenses made in the report of Bansley and Kiener, to the Illinois Federation of Teachers, dated August 10, 1987 is accurate to the best of my knowledge and belief, subject to the definitions, material factors and assumptions set forth in that report.

/s/
PAUL A. MERKEL

SIGNED AND SWORN
to this 19th day
of August, 1987.

/s/ Shirley M. Duray
Notary Public

AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Combined Statement of General Fund
Militancy Fund and Defense Fund Expenses
and Allocation between Chargeable
Expenses and Non-Chargeable Expenses

June 30, 1987

(With Auditors' Report Thereon)

KPMG Peat Marwick

Certified Public Accountants

Peat Marwick Main & Co.
1990 K Street, N.W.
Washington, DC 20006

American Federation of Teachers, AFL-CIO:

We have examined the combined statement of General Fund, Militancy Fund and Defense Fund expenses and allocation of expenses between chargeable expenses and non-chargeable expenses of the American Federation of Teachers, AFL-CIO for the year ended June 30, 1987. Our examination was made in accordance with generally accepted auditing standards and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances. We have examined the financial statements of the American Federation of Teachers, AFL-CIO for the year ended June 30, 1987, and have issued our report thereon dated August 14, 1987.

The combined expenses reflected in column A are based on our audit report for the year ended June 30, 1987 as modified for the accounts and funds described in the first paragraph of Note 1. The allocation of combined expenses between Chargeable (Column B) and Non-Chargeable (Column C) are based on the significant factors and assumptions described in Note 2.

In our opinion, the combined statement of General Fund, Militancy Fund and Defense Fund expenses and allocation of expenses between chargeable expenses and non-chargeable expenses, present fairly the combined expenses of the American Federation of Teachers, AFL-CIO for the year ended June 30, 1987, as modified for the accounts and funds described in Note 1(a), and the allocated combined expenses between chargeable

and non-chargeable expenses, based on the significant factors and assumptions described in Note 2.

/s/ Peat Marwick Main & Co.

August 14, 1987

AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Combined Statement of General Fund, Militancy Fund and Defense Fund
Expenses and Allocation Between Chargeable Expenses and
Non-Chargeable Expenses

Year ended June 30, 1987

	Column A Total expenses	Column B Chargeable expenses	Column C Non-Chargeable expenses	Notes
Direct expenses:				
Salaries	$ 6,742,655	6,163,005	579,650	2(a)
Fringe benefits	2,617,263	2,396,695	220,568	2(b)
Payroll and other taxes	504,890	461,470	43,420	2(b)
Severance and vacation pay	240,248	219,587	20,661	2(b)
Travel and related expenses	4,096,518	3,871,500	225,018	2(b)
Dues, donations and membership fees	163,445	-	163,445	2(c)
American Educator publications	757,464	727,165	30,299	2(d)
American Teacher publications	973,033	681,123	291,910	2(d)
Action publications	39,002	33,729	5,273	2(d)

[Continued]

	[Column A Total expenses]	[Column B Chargeable expenses]	[Column C Non-Chargeable expenses]	[Notes]
Reporter publications	45,507	32,692	12,815	2(d)
Preparation and printing of literature	509,670	509,670	-	2(d)
Mass and electronic media	438,921	438,921		2(e)
Newspaper advertising	265,611	265,611	-	2(e)
AFT-COPE and related activities	613,823	-	613,823	2(f)
Affiliation fees	2,473,504	-	2,473,504	2(g)
Educational training programs	205,271	205,271	-	2(h)
QuEST, regional conferences and training	67,458	67,458	-	2(h)
Assistance and collective bargaining expenses	8,290,626	8,290,626	-	2(h)
Inside Your School	243,950	243,950	-	2(i)
AIFLD Grant Program and other expenses	64,875		64,875	2(j)
State federation rebates	1,292,071	1,292,071	-	2(k)

[Continued]

	[Column A Total expenses]	[Column B Chargeable expenses]	[Column C Non-Chargeable expenses]	[Notes]
Advisory Commission on Higher Education, tuition assistance and other	54,772	54,772	-	2(l)
Militancy Fund	47,012		47,012	2(m)
Defense Fund	666,550	666,550	-	2(n)
	31,414,139	26,621,866	4,792,273	
[2] [Restatement of heading deleted in printing]				
General, administrative and operating expenses:				
National office and equipment rental	$ 2,000,183	1,694,955	305,228	2(o)
Depreciation and amortization	276,427	234,244	42,183	
Repair and maintenance	155,447	131,726	23,721	
Data processing expenses	333,496	282,605	50,891	
Interest	82,229	69,681	12,548	

[Continued]

	[Column A Total expenses]	[Column B Chargeable expenses]	[Column C Non-Chargeable expenses]	[Notes]
General insurance	70,050	59,360	10,690	
Executive council and other committee meeting expenses	971,160	822,961	148,199	
Regional office expenses	423,881	359,197	64,684	
Legal, audit and consulting expenses	626,739	531,099	95,640	
Postage, express and delivery, telephone and telegraph	439,823	372,706	67,117	
Office supplies, subscriptions, books and other expenses	441,439	374,075	67,364	
	$ 37,235,013	31,554,475	5,680,538	
	100.00%	84.74%	15.26%	

See auditors' report and accompanying notes to financial statement.

AMERICAN FEDERATION OF TEACHERS, AFL-CIO

Notes to Combined Statement of General Fund, Militancy Fund and Defense Fund Expenses and Allocation Between Chargeable and Non-Chargeable Expenses

June 30, 1987

(1) Summary of Significant Accounting Policies

(a) Accounts and Funds Excluded form the Combined Statement

The expense of providing accident and liability insurance to members and agency fee payors is recovered through premium charges to locals and has been excluded from the combined expense statement. Equity in the loss of a limited partnership investment and rent and various other operating expenses associated with the subletting operations, of the American Federation of Teachers, AFL-CIO (Federation), which are accounted for in the Federation's Building Fund, have been excluded from the combined expense statement.

(b) Income Taxes

The Federation is exempt from Federal income taxes under Section 501(c)(5) of the Internal Revenue Code.

(c) Retirement Plans

The Federation contributes a percentage of eligible employees' salaries to retirement plans. The Federation follows the practice of recording as expense its required contributions under such plans in each fiscal year.

(d) Severance and Accumulated Vacation

The Federation accrues accumulated severance and vacation expense as is earned by its employees under various contracts and agreements.

(e) Depreciation and Amortization

Depreciation and amortization are computed using the straight-line method.

(f) Leases

The Federation occupies office space in a building which is owned by a limited partnership of which the Federation is a limited partner. The lease provides for annual rental payment of approximately $3,300,000 of which 55 percent is charged to the General Fund based on the space occupied by the Federation.

[2] [Restatement of heading omitted in printing]

(2) Significant Factors and Assumptions used in the Allocation of Combined Expenses Between Chargeable and Non-Chargeable

(a) Salaries

Salary expenses of AFT-COPE and international affairs departments have been determined to be 100 percent non-chargeable. Salary expenses of executives, editorial department editors and administrative staff, special campaigns department director, as well as salary expenses for personnel responsible for the library, office management, finance, travel and meetings and the print shop have been allocated to non-chargeable expenses based on time spent by personnel on non-chargeable activities.

(b) Fringe Benefits, Payroll and Other Taxes, Severance and Vacation Pay, Travel and Related Expenses

These expenses are allocated on the basis of salary expense allocations described in note 2(a) above.

(c) Dues, Donations and Membership Fees

Dues, donations and membership fees to all organizations are considered to be 100 percent non-chargeable.

(d) American Educator, American Teacher, Action and Reporter Publications

Direct printing and publishing expenses of the American Educator, American Teacher, Action and Reporter publications are allocated based on the specific content of articles in the publications. Expenses allocable to articles considered political or ideological in nature are non-chargeable. Other preparation and printing of literature expenses are considered to be 100 percent chargeable.

(e) Mass and Electronic Media and Newspaper Advertising

Mass and electronic media and newspaper advertising expenses foster exposure to the union, and provide a method of disseminating information on union activities such as collective bargaining and educational issues. These expenses are considered to be 100 percent chargeable.

(f) AFT-COPE and Related Activities

Contribution to the Federation's Committee on Political Education Fund and related expenses are considered to be 100 percent non-chargeable.

[3] [Restatement of heading omitted in printing]

(g) Affiliation Fees

Affiliation fees are considered to be 100 percent non-chargeable.

(h) Training Programs, Conferences and Collective Bargaining

Training programs and conferences are for local, state and national staff and are to enhance staff skills in collective bargaining, grievance handling and contract administration. These expenses are 100 percent chargeable.

(i) Inside Your School

This encompasses expenses associated with video and television productions on educational issues, improvement of teaching techniques for teachers, classroom management and control and all other aspects of the teaching profession. These expenses are 100 percent chargeable.

(j) AIFLD Grant Program and Other Expenses

American Institute for Free Labor Development (AIFLD) grant and related expenses have been determined to be 100 percent non-chargeable.

(k) State Federation Rebates

State federation rebates are required by the Federation's constitution and are therefore 100 percent chargeable.

(l) Advisory Commissi1on on Higher Education

The commission is comprised of various Federation leaders and local members who deal with educational issues unique to higher education such as tenure rights, tracking and portability of pensions. These expenses are considered to be 100 percent chargeable.

(m) Militancy Fund

The militancy fund expenses are considered to be 100 percent non-chargeable.

[4] [Restatement of heading omitted in printing]

(n) Defense Fund

The defense fund is a legal defense fund available to members and non-members which grants assistance to local and state bodies to help protect the rights of teachers, career service personnel and other educational workers, as well as health care and federal, state and local employees. This fund is administered through a committee comprised of a Vice President, the Secretary-Treasurer and the General Counsel, all of the Federation.

(o) General, Administrative and Operating Expenses

General, administrative and operating expenses have been allocated to chargeable and non-chargeable expenses based on the same ratio as allocable direct expenses.

Rules for Impartial Determination of Union Fees

Effective June 1, 1986

[Logo deleted in printing]

American
Arbitration
Association

[2] Explanation

In *Chicago Teachers Union v. Hudson*, the Supreme Court of the United States held that a labor union which charges non-member employees an agency fee to defray the cost of providing service is required to give them "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while challenges are pending."

These Rules for Impartial Determination of Union Fees have been developed by the American Arbitration Association to provide "expeditious, fair, and objective" determinations of such challenges.

When a union requests administration under these Rules, the AAA will appoint an impartial arbitrator, experienced in employment relations.

These challenges could involve determinations about local, statewide, or national fees. The burden is upon the union to justify whatever fees are being disputed. Sometimes, such issues can be determined on the basis of documents. If a hearing is necessary, it should be held promptly so that the arbitrator can comply with the time limits contained in the union's internal procedures and with applicable law. Arbitrators must accompany their awards with a written justification of their determination.

The AAA is also prepared, at the request of the union, to hold a portion of the challenged union fees in escrow during the pendency of the challenge procedure.

[3]Rules for Impartial Determination of Union Fees

1. Application of Rules

A union may obtain administration under these Rules by requesting the AAA to appoint an Arbitrator to determine the appropriate amount of a union fee in one or more of its bargaining units. These Rules shall apply subject to and in accordance with the applicable statutory law and the internal procedures of the union involved.

2. Initiation of Arbitration

To initiate an arbitration under these Rules, a union shall notify the AAA that challenges of its fees have been received from one or more individual employees, which are to be determined by an impartial arbitrator. The letter of notification shall identify the unions involved and the names and addresses of the individuals who have challenged the union fee or who, in accordance with the organization's internal procedures, should be notified of the proceedings (hereinafter called the participants).

The letter of notification should describe the issues involved and notify the AAA of any relevant time limits contained in the applicable law or the union's internal procedures. The initiating letter may suggest an appropriate location for hearing.

3. Appointment of Arbitrator

Upon receiving such an initiating letter, but prior to making an appointment, the AAA will select an Arbitrator from a special panel of experienced labor Arbitrators who is willing to hear and decide such issues in accordance with the applicable law and the union's internal procedures, and who is prepared to meet the applicable time limits. Thereupon, the AAA will appoint the Arbitrator to the case, notifying the union and the other participants.

4. Disclosure of Grounds for Disqualification
Prior to accepting the appointment, a prospective Arbitrator shall disclose any circumstances likely to create a presumption of bias. In its discretion, the AAA may disqualify an Arbitrator based on such disclosure. After participants in the procedure are [4]notified of an appointment, they may challenge an Arbitrator for cause by promptly notifying the AAA of their objection.

5. Vacancies
If any Arbitrator should resign, die, withdraw, or be unable or disqualified to perform the duties of office, the AAA may, in its discretion, declare the office vacant and appoint a substitute.

6. Notification of Proceedings
Notice of the time and place of the arbitration hearing, as determined by the Arbitrator, will be mailed to the participants by the AAA.

7. Representation by Counsel
Any participant may be represented by counsel or by an authorized representative.

8. Stenographic Record
Any participant wishing a stenographic record shall make such arrangements directly with the stenographer, notifying the AAA in advance of the hearing. If such a transcript is determined by the Arbitrator to be the official record of the proceeding, it must be made available to the Arbitrator and to other participants for inspection, at a time and place determined by the Arbitrator.

9. Attendance at Hearing
Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator shall have the power to require the retirement of any witness during the testimony of other witnesses. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other persons.

10. Adjournment
The Arbitrator for good cause shown may adjourn a hearing upon the request of a participant or upon the Arbitrator's own initiative, but must observe all applicable time limits.

11. Oaths
The Arbitrator may require witnesses to testify under oath.

12. Order of Proceedings
The Arbitrator shall determine how the case may best be presented so that all participants have a fair [5]opportunity to contest the issues. The names and addresses of all witnesses and exhibits in order received shall be made a part of the record. The Arbitrator shall afford full opportunity for presentation of relevant proofs.

13. Arbitration in the Absence of a Participant
The arbitration may proceed in the absence of any individual participant who, after due notice, fails to be present or fails to obtain an adjournment. The Arbitrator shall require the union to submit such evidence as may be required for the making of a determination.

14. Evidence
The participants may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary.

15. Evidence by Affidavit and Filing of Documents
The Arbitrator may receive and consider the evidence of witnesses by affidavit, giving it only such weight as seems proper after consideration of any objections made to its admission. Participants shall be afforded an opportunity to examine all documents submitted in the proceedings. Documents not filed with the Arbitrator at the hearing, but which are arranged to be

submitted later, shall be filed with the AAA for transmission to the Arbitrator.

16. Closing of Hearings
The Arbitrator shall determine when sufficient evidence has been submitted for an understanding and determination of the dispute. At that point, the Arbitrator may declare the hearings closed. If briefs or other documents are to be filed, the hearings may be declared closed as of a later date set by the Arbitrator. The time limit within which the Arbitrator is required to make an award shall be that contained in the applicable law and the union's internal procedures. If no specific date is fixed, the Arbitrator shall have 30 days from the close of hearings within which to make an award.

17. Reopening of Hearings
The hearings may be reopened by the Arbitrator at [6]will or on the motion of any participant, for good cause shown, at any time before the award is made, but if the reopening of the hearings would prevent the making of the award within the time specified in the applicable law and the union's internal procedures, the matter may not be reopened.

18. Waiver of Rules
Any participant who proceeds after knowledge that any provision or requirement of these Rules has not been complied with, and who fails to state an objection thereto in writing, shall be deemed to have waived the right to object.

19. Waiver of Oral Hearings
The union may provide for the waiver of oral hearings. If the participants are unable to agree as to the procedure, the Arbitrator shall specify a fair and equitable procedure.

20. Extensions of Time
The Arbitrator for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and the reason therefor.

21. Serving of Notices
Each participant shall be deemed to have consented and shall consent that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these Rules may be served by mail to the participant's last known address or by personal service.

22. Communication with Arbitrator
Unless the union's internal procedures otherwise provide, there shall be no communication between the participants and the Arbitrator other than at oral hearings. Written communications from the participants to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

23. Time of Award
The award shall be rendered promptly by the Arbitrator and, unless otherwise specified by the applicable law and the union's internal procedures, not later than 30 days from the date of closing the hearings, or, if oral hearings have been waived, from the date of transmitting the final statements and proofs to the Arbitrator.

[7]24. Form of Award
The award of the Arbitrator shall be in writing and signed and shall be accompanied by a written justification of the Arbitrator's decision.

25. Delivery of Award
The participants shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to each participant's last known address or the filing of the award in any manner which may be prescribed by applicable law and the union's internal procedures.

26. Judicial Proceedings
Neither the AAA nor the Arbitrator is an appropriate or necessary party in judicial proceedings relating to this procedure, and neither the AAA nor any Arbitrator shall be liable to any

participant for any act or omission in connection with any procedure conducted under these Rules.

27. Administrative Fee
As a nonprofit organization, the AAA shall charge a fee payable by the union to compensate the AAA for the cost of providing necessary administrative services.

28. Expenses
The expense of witnesses shall be paid by the party producing such witnesses.

29. Arbitrator Compensation
The Arbitrator will be compensated by the union, in accordance with the per diem rate currently on file for that Arbitrator with the AAA, and shall be reimbursed for expenses.

30. Interpretation and Application of Rules
The Arbitrator shall interpret and apply these Rules insofar as they relate to the Arbitrator's powers and duties. All other Rules shall be interpreted and applied by the AAA.

1987-88

NON-MEMBER FAIR SHARE PAYMENTS -- CHICAGO TEACHERS UNION IMPLEMENTATION PROGRAM AND APPEAL PROCEDURE

1. Fair Share Fee Determination.

The amount of the fair share fee which nonmember employees are required to pay to the Union pursuant to the Agreement between the Board of Education of the City of Chicago and the Chicago Teachers Union will be determined by the Union. The Union will give fee payers notice of the amount and the basis of the fee in the manner prescribed by law and by the Agreement with the Board of Education.

2. Union's Internal Appeal Procedure.

a. Filing Objections.

Any fee payer may challenge the Union's calculation of the fee by sending a letter, postmarked or delivered on or before February 22, 1988, addressed to:

Chicago Teachers Union President
201 North Wells Street, Ninth Floor
Chicago, Illinois 60606

The letter should contain the objection (either to a specific category of expenses or the calculation in general), state the desire to invoke the Union's Internal Appeal Procedure, contain the objecting fee payer's name and address, and bear the objector's signature.

The Union shall initiate arbitration by sending notice of objections to the American Arbitration Association ("AAA") pursuant to the Rules for Impartial Determination of Union Fees, which rules shall govern the arbitration proceedings unless they conflict with procedures specified herein.

[2]The Arbitrator appointed by the AAA shall set the hearing to begin no later than March 23, 1988. On and after March 1, 1988, the Union will make available to objectors the books and records on which it relies to justify its fees. On and after March 16, 1988, the Union will make available copies of exhibits that the Union intends to offer and a list of witnesses that the Union intends to call in its case in chief, and other relevant records requested by an objector; any disputes concerning such discovery shall be submitted to the Arbitrator for determination.

At hearing the Union shall have the burden to prove that the amount of the fee assessed was in accord with applicable (Illinois and federal) law. The Arbitrator shall have the authority to refund portions of the fee and interest thereon only where such is required by applicable law. The award shall be final and binding to the extent permitted by law.

The Arbitrator shall issue a written award not later than 30 days from the close of hearing or from the date of any post-hearing briefs or other submissions permitted by the Arbitrator at the close of hearing.

3. Escrow Arrangements.

Upon the Union's receipt of a letter of objection invoking this procedure, the Union shall deposit in an escrow account, separate from all other Union Funds, the amount of fee payments received on behalf of the objector that is fairly placed at issue by the objection(s) stated in the letter but not less than 33% of the fair share fee. The Union shall furnish the objector with verification of the terms of the escrow arrangement.

[3]The escrow fund will be established and maintained by a reputable independent bank or trust company and the agreement therefore shall provide that the escrow accounts be interest-bearing at the highest rate available for the amount of opening deposit and that the escrowed funds remain intact until the final disposition as provided for herein.

The escrow fund -- or the portion(s) thereof applicable to a particular objector(s) -- shall terminate and the fund (or portion) be distributed by the escrowee: (1) pursuant to the terms of an arbitration award, unless an action for judicial review is filed and served within thirty-five days of the date of the award, (2) pursuant to a final judgment, including any appeals, (3) pursuant to the terms of a mutually agreeable settlement between the Union and an objector or objectors, or (4) upon abandonment of the objection (as evidenced, for example, by the objector's failure to advance to the next step of the procedure or otherwise communicate his or her intention at a necessary point in the procedure).

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amendment I - Freedom Of Religion, Speech And Press; Peaceful Assemblage; Petition Of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV - Citizenship; Privileges And Immunities; Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

CIVIL RIGHTS ACT OF 1871

42 U.S.C. § 1983. Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ILLINOIS SCHOOL CODE

Ill.Rev.Stat. ch. 122, para. 10-22.40a (Smith-Hurd): Non-member Proportionate Share Payments In Lieu Of Dues

§ 10-22.40a. Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payments shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization.

No. 90-1550

Supreme Court, U.S.
FILED
MAY 31 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTERLENE HOLMES, EDNA ROSE MCCOY, DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD,

Petitioners,

v.

CHICAGO TEACHERS UNION, LOCAL NO. 1., ROBERT HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, GLENDIS HAMBRICK, Individually and as Officers of the Chicago Teachers Union, BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS, RAOUL VILLALOBOS, MARTHA JANTHO, THOMAS CORCORAN, BETTY BONOW, SOL BRANDZEL, CLARK BURRUS, LEON JACKSON, ROSE MARY JANUS, DR. WILFRED REID, MYRNA SALAZAR, DR. LUIS SALCES, and VIOLA THOMAS, Individually and as Officers and Members of the Board of Education of the City of Chicago, Illinois,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the district court and the court of appeals properly determined that the Union's extensive fair share fee notice (set out at Pet. App. 52a-110a) provides "an adequate explanation of the basis for the fee" as required in *Chicago Teachers Union v. Hudson*, 476 U.S. 292, 310 (1986).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1550

ANNIE LEE HUDSON, K. CELESTE CAMPBELL, ESTERLENE HOLMES, EDNA ROSE MCCOY, DEBRA ANN PETITAN, WALTER A. SHERRILL, and BEVERLY F. UNDERWOOD,

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CHICAGO TEACHERS UNION, LOCAL NO. 1., ROBERT HEALEY, JACQUELINE B. VAUGHN, ROCHELLE D. HART, THOMAS H. REECE, GLENDIS HAMBRICK, Individually and as Officers of the Chicago Teachers Union, BOARD OF EDUCATION OF THE CITY OF CHICAGO, ILLINOIS, RAOUL VILLALOBOS, MARTHA JANTHO, THOMAS CORCORAN, BETTY BONOW, SOL BRANDZEL, CLARK BURRUS, LEON JACKSON, ROSE MARY JANUS, DR. WILFRED REID, MYRNA SALAZAR, DR. LUIS SALCES, and VIOLA THOMAS, Individually and as Officers and Members of the Board of Education of the City of Chicago, Illinois,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

The opinions below, the basis of this Court's jurisdiction, and the constitutional and statutory provisions involved are set out at pp. 1, 2 and 111a-112a of the petition for a writ of *certiorari* and the appendix thereto (hereinafter "Pet. ——" and "Pet. App. ——").

STATEMENT

In *Chicago Teachers Union v. Hudson*, 476 U.S. 292 (1986), this Court set three "constitutional requirements for the Union's collection of agency fees" from public employees:

> [i] an adequate explanation of the basis for the fee, [ii] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and [iii] an escrow for the amount reasonably in dispute while such challenges are pending. [*Id.* at 310.]

These requirements reflect the Court's recognition that the "government interest in labor peace is strong enough to support an 'agency shop' notwithstanding its limited infringement on nonunion employees' constitutional rights" (*id.* at 302-303) and are designed "to minimize the infringement" (*id.* at 303) on those rights.

After this Court's *Hudson* decision, as the court of appeals explained, the Chicago Teachers Union ("CTU" or the "Union") "attempted to revise its fair share notice procedure to comply with *Hudson*'s mandate." Pet. App. 5a. The Union's "revised procedure was implemented for the 1986-87 school year (FSN-2)" and its legal adequacy was challenged by petitioners in the district court on remand. *Id.*[1] "While the adequacy of FSN-2 was before the district court, the parties agreed that all fair share fees collected by the CTU would be deposited with the clerk of the court . . ." pursuant to Rule 67, F.R.C.P. *Id.* Before the district court ruled on the adequacy of FSN-2, "the 1987-88 school year began, and the CTU had further refined its fair share notice procedure (FSN-3)." *Id.* "By agreement of the parties, the lawsuit

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[1] The court below used the initials "FSN" to designate the CTU's Fair Share Fee Notice. FSN-1 refers to the original notice; FSN-2 to the 1986-1987 school year notice; and FSN-3 to the 1987-1988 school year notice.

focused on the adequacy of FSN-3 rather than FSN-2." *Id.*

The district court found that the CTU's 1987-1988 school year fair share fee notice (FSN-3) met *Hudson*'s "adequate explanation of the basis of the fee" requirement:

> [T]he CTU's 1987-88 notice discloses to nonunion employees the calculations and assumptions underlying the fair share fee. This notice includes all of the features required by the Supreme Court in *Hudson*. For instance, the notice breaks down the fee into its component parts, listing the CTU's major categories of expenses. The notice also reveals the CTU's method of expenses. The notice also reveals the CTU's method for calculating the fee, including the CTU's definition of collective bargaining. Furthermore, an independent auditor has verified that the CTU actually made the expenditures described in the notice. This verification incorporated the best format and the highest level of service offered by the accounting profession. Finally, and most importantly, the notice is serving its intended purpose [of] . . . providing potential objectors with sufficient information to gauge the propriety of the fee. [Pet. App. 38a.]

And, "[a]fter reviewing the FSN-3, [the court of appeals] conclude[d] that the district court properly found that it was constitutionally adequate under *Hudson* and in accordance with [that court's] prior precedents because it provides sufficient information to enable the plaintiffs 'to decide whether there is any reason to mount a challenge.' " Pet. App. 21a, quoting *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 278 (1989).

Circuit Judge Ripple's opinion (joined by Circuit Judge Coffey and Senior District Judge Reynolds), moreover, cogently explains how FSN-3 meets both the letter and the spirit of this Court's *Hudson* decision.

First, said the court of appeals, FSN-3 "informs nonmember employees that their fair share fee reflects the nonmembers' proportionate share of the costs of services rendered by the CTU necessarily and reasonably incurred for the purpose of performing collective bargaining activities." Pet. App. 19a.[2]

> The FSN-3 identifies and defines two categories: chargeable expenses and non-chargeable expenses. Each category is defined and further broken down to specific items of expenditures. The non-chargeable expenses category follows a similar detailed breakdown. [Pet. App. 19a (footnote omitted).]

Second, FSN-3 contains reports from independent certified public accountants allocating the Union's expenditures into the chargeable and nonchargeable categories:

> The FSN-3 contains the CTU's audit report prepared by its independent certified public accountant. The CTU's accountant issued a "special report," which, the CTU informs us and plaintiffs do not contest, is the highest level of review and the best format for presenting the results of such a review. The report allocates expenses in twenty-two line items between those that are chargeable and those that are nonchargeable and provides a dollar amount for each category. The report further provides a detailed explanation of the techniques employed in producing the report. The FSN-3 also provides similar audit reports for the state and national unions affiliated with the CTU. [Pet. App. 19a-20a (footnotes omitted).]

Third, to assist the nonmember in understanding the voluminous accounting material contained in FSN-3, the notice contains "a two page summary sheet that gives an

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[2] FSN-3 is reproduced in its entirety at Pet. App. 52a-110a. In its original format, the notice comprised 39 pages and was color-coded for the convenience of readers.

overview of how the accounting reports were translated into calculation of the fair share fee." Pet. App. 20a.

> The summary breaks down the CTU's expenditures into thirteen functional categories, providing the percentage of total expenditures within each category. Twelve of the categories are treated as chargeable in calculating the fair share fee, and the thirteenth category groups all nonchargeable expenditures. [Pet. App. 20a (footnote omitted).]

Fourth, the notice concludes by "detail[ing] the arbitration procedure available to employees who wish to challenge the fee, and the rights of employees in that procedure." Pet. App. 20a.

> [FSN-3] explains that an employee may initiate a challenge by stating an objection in a letter to the CTU and that the CTU will have the burden of proving that the fee amount is pursuant to applicable federal and state law in any arbitration proceeding. Finally, the CTU offers to make available to a challenger any relevant books and records prior to and in preparation for the arbitration proceeding. [Pet. App. 20a-21a (footnote omitted).]

Finally, the court of appeals reviewed "other cases in which courts have found the notice provisions inadequate under *Hudson*" and determined that "CTU's FSN-3 suffers from none of the deficiencies identified in those cases." Pet. App. 21a; footnote omitted.

On the basis of all of the foregoing, the court of appeals held that the Union's 1987-1988 school year fair share fee notice complies with *Hudson*.

ARGUMENT

At this juncture, as the court of appeals emphasized, this case "focuses on the first requirement" for a union's collection of agency fees established in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986): that the union must provide nonmember fee payers "an adequate explanation of the basis for the fee." Pet. App. 15a quoting 475 U.S. at 310. The court below carefully reviewed the Union's comprehensive notice and explained at length why that notice meets *Hudson*'s "adequate explanation" requirement. Pet. App. 17a-21a. See also pp. 3-5 *supra*.

The court of appeals' understanding of *Hudson* is, as we show below, correct beyond peradventure. That court's application of *Hudson*'s teachings to the particular facts of this case is equally unassailable. And, the petition's claim of a conflict in the lower courts as to the meaning and proper application of the *Hudson*'s "adequate explanation" requirement is totally without substance. The *certiorari* petition should therefore be denied.

1. *Hudson* explains that the purpose of requiring "an adequate explanation of the basis for the fee" is to insure that the nonmember will "be given sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306. To this end, the explanation of the fee must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-307. *Hudson* also specifies how a union is to identify these expenditures in the fee notice:

> The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. [*Id.* at 307 n.18.]

In the court below and in their petition, the petitioners' attacks on the Union's fair share fee notice

> have little to do with the constitutional *adequacy* of FSN-3. Instead, the [petitioners] attack how the CTU *calculated* the fair share fee . . . . Taken in its entirety, plaintiffs' challenge asserts that a prior hearing and prior judicial determination of the correctness of a fair share fee is a precondition to the collection of the fee. [Pet. App. 15a-16a (emphasis in original).]

We cannot improve on the court of appeals clear and acute rejection of the plaintiffs' position in this regard and we therefore rest on that court's reasoning:

> Were we to accept plaintiffs' invitation and provide a hearing and judicial determination of the correctness of the fee, we would in effect render redundant and irrelevant the requirements that an impartial decisionmaker hear the dispute and that an escrow account be provided for the amounts reasonably in dispute while the challenge is pending. The proper procedure employs each of the three prerequisites identified by the Supreme Court: the fair share notice provides the basis for a challenge to the fair share fee assessment; the impartial decisionmaker determines the correctness of the fee amount; and the escrow protects the challenger's funds pending such a decision. The Supreme Court's prerequisites presuppose that a fee has already been collected and that the challenge will be decided after the fee has been collected. The federal court does not, at this stage, review the fee calculation. [Pet. App. 16a-17a].[3]

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[3] The court of appeals was careful to add that full federal court review of an objecting fee payer's challenge to a union's fee calculation is also available:

> Of course the impartial decisionmaker's determination is not the final word on the challenge. *If* the decision is adverse to the plaintiffs, they may *subsequently* seek review by a federal court. [Pet. App. 17a (emphasis in original).]

For an example of such a review see, e.g., *Lehnert v. Ferris Faculty Ass'n*, —— U.S. ——, Slip Op. 4 (No. 89-1217) (May 30, 1991)

The court of appeals, in short, quite properly rejected petitioners' invitation to collapse the tripartite notice/arbitration/escrow procedure that this Court established in *Hudson* into a pre-collection federal court "determination of the correctness of a fair share fee" (Pet. App. 16a), that preempts two of the three *Hudson* requirements.[4]

(after 12 day bench trial, district court determined that some expenditures were chargeable, that some were nonchargeable, and that the union had failed to meet its burden of proof with respect to other expenditures).

A separate strand of the *Lehnert* litigation involved a challenge to the *Hudson* procedures adopted by the Ferris Faculty Association. The lower courts upheld those procedures and this Court denied the fee payers' petition for a writ of *certiorari* from that decision. *Lehnert v. Ferris Faculty Ass'n*, 893 F.2d 111 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 2586 (1990). It is this latter aspect of *Lehnert* that is parallel to the instant case.

[4] Petitioners now claim that the lower court also interposed an exhaustion bar on their right to bring a federal court suit at this time. Pet. 25. But exhaustion of the Union's internal procedures as a precondition to suit was never at issue. It was understood by all concerned that the petitioners never initiated, much less exhausted, the available arbitration procedure. The petitioners were not, however, foreclosed from litigating on that basis. Rather as the foregoing quotation shows, the petitioners were permitted to pursue their claims which were rejected on the merits as inconsistent with *Hudson*.

Indeed, the limitation of which the petitioners complain is self-imposed. On remand from this Court, they "amended their complaint to focus exclusively on procedural due process" (Pet. at 3); *viz.*, on the *adequacy* of the notice. The *accuracy* or legitimacy of the specific dollar changes itemized in the union's notice is a separate issue. This Court in *Hudson* recognized precisely that distinction (475 U.S. at 304, n. 13), as did petitioners, who—until now—had repeatedly described their suit as a "challenge . . . to the procedures, not the expenditures." Thus, the record here did not put exhaustion at issue and it is, accordingly, not properly raised before this Court. See *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) and *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. The court of appeals, moreover, carefully attended to this Court's guidance regarding the *Hudson* "limited notice requirement" (475 U.S. at 306, n. 17)—as well as to *Hudson*'s caution that "'[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" (*id.* at 307, n. 18)—in determining whether the particular fair share fee explanation challenged here is adequate.

a. As the opinions below explain, FSN-3 sets out the types of expenditures that are classified as chargeable and the types classified as nonchargeable; shows the allocation of union expenditures into these two categories in unqualified audit reports issued by independent CPAs; explains how the CPAs audited this allocation; and offers nonmembers a full hearing on any challenge to the fee calculation. Pet. App. 18a-21a & 38a. This notice is certainly not open to a charge of "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee. . . ." 475 U.S. at 306. Indeed, as the court of appeals has aptly noted, a notice that provided more information would risk overwhelming the nonmember in details and being challenged on the ground that it is "as long and complicated as an SEC prospectus." *Gilpin v. AFSCME*, *supra*, 875 F.2d at 1316.

b. Both in the court below and in this Court, the petitioners claim that FSN-3 is not "a legally valid and scientifically rational notice." Pet. 26 (emphasis omitted). Significantly, the petitioners do *not* deny that FSN-3 faithfully reflects how CTU calculated the agency fee. Rather, their objection is that the calculation set forth in the notice is itself "patently irrational." Pet. 29. For the reasons the court of appeals stated, this line of attack goes wide of the target. *See.* pp. 6-7, *supra.* Just as "the Fourteenth Amendment does not enact Herbert Spencer's Social Statics" (*Lochner v. N.Y.*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), that Amendment does not command adherence to the accounting or eco-

nomic theories of petitioners' less-famed experts. Compare, Pet. 12, n. 34.[5]

c. It is also very much to the point that, each of the petitioners' objections to the CTU's calculation of the agency fee rest on the information provided by the Union's fair share fee notice.

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[5] Indeed, if CTU's method of calculating the agency fee is, as the petitioners charge, "patently irrational", the Union has good company in its irrational ways, namely this Court, the Illinois Educational Labor Relations Board, and the American Institute of Certified Public Accountants.

First, the Union's definition of chargeable expenditures comports with the "germane to collective bargaining" standard established by this Court's decisions. *See Ellis v. Railway Clerks*, 466 U.S. 435. 456 (1984).

Second, in each particular challenged by the petitioners, the Union's classification of expenditures as chargeable is in accord with the decisions of the Illinois Educational Labor Relations Board, the administrative agency the State has designated to superintend the fair share fee system. *See Lake Cty. Fed. of Teachers*, 4 PERI ¶ 1096, IX 391-392 and 406 (1988).

Third, by basing the agency fee on normal union dues reduced by the percentage of nonchargeable expenditures, CTU is simply following this Court's repeated statement that the agency fees to be paid by objecting nonmembers are to be set by reducing normal union dues by the "proportion that union political expenditures bear to total union expenditures. . . ." *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963). *See also, Abood v. Detroit Board of Education*, 431 U.S. 209, 240 (1977); *Chicago Teachers Union v. Hudson, supra*, 475 U.S. at 307 n. 18.

Finally, the "special report" issued by the independent certified public accountants on CTU's allocation of expenditures represents, in the words of the court of appeals, "the highest level of review and the best format for presenting the results of such a review" known to the accounting profession. Pet. App. 19a.

Calculating the initial fee on the basis of a definition of what is chargeable grounded in the latest precedents of the state agency charged with administering the state's agency fee law, according to a formula suggested by this Court, and in compliance with the "highest level of review" known to current accounting practice is the very opposite of "patent[] irrational[ity]."

The four types of chargeable expenditures, whose scope is challenged by the petitioners, are clearly spelled out in the definition of chargeable expenditures given in the accountants' report. Pet. App. 68a-70a; *see also id.* at 83a-84a. The fact that agency fees equal the amount of normal Union dues multiplied by the chargeable percentage of Union expenditures is clearly explained in a section of the notice entitled, "the Basis of the 1987-88 Fair Share Fee." Pet. App. 60a. Furthermore, at the outset the accountants' report states that it is based on an "examination . . . made in accordance with generally accepted auditing standards, and, accordingly, included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances." Pet. App. 63a. That report goes on to summarize what those tests and procedures were, including the procedures employed to allocate salary-related expenditures, which the petitioners single out for criticism. Pet. App. 67a-72a.

Thus, from the petitioners' objections alone, it is evident that FSN-3 fills its office of providing nonmembers "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306.[6]

3. Petitioners' obligatory obeisance to a "conflict" in the lower courts is an empty gesture. No court has accepted the invitation made by the petitioners here to

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[6] Petitioners' suggestion that *Hudson's* tripartite procedure is inherently unworkable is wholly unfounded. *Hudson* does not simply require unions to prepare an informative, verified fair share fee notice but also a reasonably prompt opportunity to challenge the fee in which the nonmember employee need only state his objection and the union bears the burden of proving the legal and factual validity of the fee in every respect. Not only would it be entirely counterproductive for a union faced with that prospect to issue a "purported 'notice' that apes the form, but lacks the informational substance *Hudson* demands" (Pet. 23) but also, in practice, "unions seeking to comply with the post-*Hudson* administrative and judicial decisions are erring on the side of caution," (Matsis, "Procedural Rights of Fair Share Objectors After *Hudson* and *Beck*," 6 The Labor Lawyer 251, 293 (1990)).

"micro-manage the fee calculation" in the course of determining whether *Hudson*'s requirement for an "adequate explanation of the basis for the fee" has been met. Pet. App. 16a. The Fourth Circuit's recent decision in *Dashiell v. Montgomery County*, 925 F.2d 750, 756-757 (4th Cir. 1991), summarizes the uniform view in the courts of appeals:

> [T]he First Amendment, as interpreted by *Hudson*, requires only that the union disclose as part of its initial explanation to employees (1) such information that reveals to the employees major description categories of expenses which will be assessed against the employers; (2) the component dollar amounts of each category so chargeable; and (3) information to show that the financial figures have been verified by an independent auditor. No more could practically be required at this stage. We, therefore, join the decisions in the Second, Sixth, and Seventh Circuit, which reach the same conclusion.

As *Dashiell v. Montgomery County* recognizes, the two Sixth Circuit cases cited by the petitioners (Pet. i & 16), parallel rather than diverge from the Seventh Circuit cases. In *Tierney v. City of Toledo*, 917 F.2d 927, 929 (6th Cir. 1990), the Sixth Circuit stated:

> [I]t is not our function here to render a final accounting or strike the ultimate balance but rather to ensure that the procedures by which these conflicts are resolved sufficiently comply with Supreme Court mandates to allow the controversy to go to meaningful arbitration.

In an earlier *Tierney* opinion, the Sixth Circuit stated that the categorization of particular expenditures as chargeable or nonchargeable is *not* an issue to be addressed in ruling on the adequacy of the union's objection procedures:

> It is not necessary for us to anticipate the categorization of any potential expense, for we see this as an administrative determination by the independent

decisionmaker, under the law developing in cases such as *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). [*Tierney v. City of Toledo*, 824 F.2d 1497, 1504-05 (6th Cir. 1987).]

The other three decisions cited by the petitioners as conflicting with the decision below—*Schneider v. Colegio de Abodagos de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990); *Harrison v. Massachusetts Society of Professors*, 405 Mass 56, 537 N.E. 2d 1237 (1989); *Gibney v. Toledo Board of Education*, 40 Ohio St. 3d 152, 532 N.E. 2d 1300 (1988)—are not remotely in point. None of these decisions examine a fair share fee notice to determine if the notice provides "an adequate explanation of the basis for the fee." Pet. App. 15a. And none "pass on the legality and accuracy of every element of the fee calculation," Pet. App. 16a, as the petitioners would require whenever a court is called upon to determine the adequacy of a fair share fee notice. Thus, the conflict asserted in the petition (Pet. i. & 16), simply does not exist.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-1550

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ANNIE LEE HUDSON, *et alia*,

Petitioners,

v.

CHICAGO TEACHERS UNION, LOCAL NO. 1, *et alia*,

Respondents.

On petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioners Annie Lee Hudson *et alia* ("the teachers") hereby reply to the four major mistakes in respondents' brief in opposition.

ARGUMENT

I. Respondents echo the error in the Court of Appeals' and District Court's decisions that the teachers are challenging "the calculation" of the "fair-share fee"—that is, its arithmetical amount, rather than "the constitutional adequacy" of the "fair-

share" notice *sub judice* (FSN-3)—that is, the legal (im)propriety and economic (non)rationality of the underlying method the unions used to calculate the fee.[1] The short rejoinder to respondents' complaint is that the lower courts could and should have addressed the teachers' arguments without "calculating", or even taking the first step in "calculating", the "fair-share fee" at all, in the sense of arriving at a final number, correct or incorrect, for that fee.

One need not determine what the correct fee actually is to know that a "fair-share" notice predicated on legally faulty definitions of "collective bargaining"[2] will necessarily be inaccurate. Neither need one determine what the correct fee actually is to know that a notice structured around an economically incompetent method for cost-allocation[3] cannot possibly arrive at the right answer for the fee. Nor need one determine what the correct fee actually is to know that a notice exhibiting inadequate auditors' "verifications"[4] cannot satisfy *Hudson*'s[5] requirement that a reliable independent check of the unions' calculation appear in the notice itself (even if that calculation ultimately were to prove accurate). And this Court in *Hudson* did not determine what the correct fee was under the unions' original "fair-share" notice (FSN-1) when it implicitly held unconstitutional the unions' "*residuum*" theory for calculating that fee.[6]

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[1] *See* Brief in Opposition ("BIO") at 6-8.

[2] *See* Petition ("PET") at 6-8.

[3] *See id.* at 8-9.

[4] *See id.* at 9-11.

[5] Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

[6] *See* PET at 19-20.

So, respondents' claim that the teachers seek "to collapse the tripartite notice/arbitration/escrow procedure * * * established in *Hudson*"[7] itself collapses for two reasons: (i) It is operationally unnecessary to "calculate" the fee to conclude that FSN-3 is invalid because it rests on legal, economic, accounting, and other methodological errors—and, therefore, the lower courts were wrong to hold that they should not address the methodological problems with FSN-3 because to do so would supposedly impinge on the role of the "impartial decisionmaker". And (ii) this Court in *Hudson* invalidated FSN-1 precisely because of that notice's methodological errors, without "calculating" the correct fee or "collapsing the tripartite * * * procedure" the Court established in that very decision—thus proving that the lower courts' reluctance to address the teachers' arguments amounts to evasion and repudiation, not implementation, of *Hudson*.

II. Equally faulty for at least two reasons is respondents' theory that an issue of exhaustion is "not properly raised before this Court" because in the lower courts the teachers challenged only "the *adequacy* of the notice" and not "[t]he *accuracy* or legitimacy of the specific dollar changes [*sic*] itemized in the union's notice".[8]

First, the plainly inescapable fact is that the teachers raised numerous methodological objections to the constitutionality of FSN-3; and the lower courts refused to address on the merits any of these objections, on an exhaustion-rationale:

> *District Court*—"[T]he court finds [the teachers'] objections to the fee's derivation largely irrelevant. By making these objections in this forum, [the teachers] are simply wasting their breath—and this court's time."[9]

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[7] BIO at 8.

[8] *Id.* at 8 n.4.

[9] Appendix to Petition ("APP") at 33a.

> *Court of Appeals*—"[The teachers] have advanced a plethora of objections to the CTU's methods for calculating the fair share fee amount. We need not pass on their merits because the proper forum for these objections is before the independent arbitrator, not before this court."[10]

Under the very decisions respondents wrongly cite, these explicit rulings by both lower courts bring the issue of exhaustion squarely before this Court.[11]

Second, according to respondents' own notion that challenging the methodological adequacy of FSN-3 in reality and unavoidably challenges the calculational accuracy of the fee, no logical or meaningful legal distinction exists between the teachers' attack (in respondents' words) on "the *adequacy* of the notice" and an attack on "[t]he *accuracy* * * * of the specific dollar cha[r]ges" in FSN-3. For that reason, according to respondents' own theory, when the teachers challenged the "notice" they were *ex necessitate* also challenging the "cha[r]ges"—indeed, by respondents' lights, a challenge to the "notice" inexorably reduces to a challenge to the "char[g]es". And, therefore, the lower courts' invocations of exhaustion with respect to the ultimate, underlying, and controlling issue of the "cha[r]ges" (or the calculation of the fee) were inescapably invocations of exhaustion with respect to the issue of the "notice". Surely respondents cannot be suffered simultaneously to argue both that the teachers' challenge to the "notice" is actually—ineluctably—a challenge to the "cha[r]ges" and that, notwithstanding this inextricable interrelationship

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[10] *Id.* at 21a.

[11] *E.g., see* Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970): "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." Self-evidently, where the Court of Appeals not only "consider[s]" an issue, but also explicitly relies on its ruling with respect to that issue as the *ratio decidendi* for denying the teachers' claims, the issue is a proper one for review by writ of certiorari.

between the two issues, the lower courts' reliance on the doctrine of exhaustion supposedly with respect to the issue of the "cha[r]ges" in no way implicates an exhaustion-ruling on the issue of the "notice"!

Respondents' careful avoidance of any reference to the actual, unmistakable holdings of the lower courts on exhaustion; the puerile double-dealing in the arguments they assert, now completely conflating, now totally separating the issues of "notice" and "cha[r]ges"; and the studied demotion to treatment in a mere footnote in their brief of the exhaustion-problem all emphasize their worried recognition that that issue deserves and demands review here, as the unavoidable next step in the evolution of the *Hudson* doctrine.[12]

III. Respondents pretend that the teachers are attempting to constitutionalize "the accounting or economic theories of [their] less-famed experts", and that these theories have already been rejected by this Court.[13] On both counts, respondents err.

First, the teachers seek merely a judicial hearing on and determination as to whether FSN-3 satisfies rational accounting and economic standards. Surely, the First Amendment (as well as the Due Process Clause of the Fourteenth) requires that a "fair-share" notice meet some ascertainable level of competence with respect to these (as well as other applicable) disciplines—as *Hudson* teaches, in its rejection of the unions' "*residuum*" theory as a defense for FSN-1.[14] In the event, the teachers may be unable to convince the trier of fact that FSN-3 falls below minimum standards in these regards. But, notwithstanding that

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[12] *See* PET at 28.

[13] BIO at 9-10 & n.5.

[14] *See* PET at 19-20.

possibility, they retain an *absolute* procedural-due-process right to be heard,[15] which the lower courts have abridged.

Second, this Court has not approved the entirety of the unions' definitions of what constitutes "collective-bargaining" (and therefore "chargeable") activities. To the contrary: both *Ellis*[16] and *Abood*[17] plainly reject many of the most important of these definitions.[18] Similarly, this Court has not adopted a "subtractive" formula for calculating "fair-share" fees, by which a union may deduct from its normal membership dues what it unilaterally concedes are "political" (or otherwise nonchargeable) expenditures, and treat the remainder as presumptively chargeable to nonunion employees. To the contrary: *Hudson* itself condemned such a "*residuum*" theory in no uncertain terms.[19] And this Court has never held, and surely would never hold, that an accountant's "verification" is necessarily sufficient under *Hudson* simply because it appears in the form of "'the highest level of review' * * * known to the accounting profession".[20] For this Court is aware that an accountant's "verification" can be both unqualified and nonetheless dead wrong, where (as here) the accountant (even inadvertently) uses legally improper definitions of "collective bargaining", employs an economically incompetent method of cost-allocation, gives nonunion employees

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[15] *See* Carey v. Piphus, 435 U.S. 247, 266 (1978).

[16] Ellis v. Railway Clerks, 466 U.S. 435 (1984).

[17] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[18] *See* PET at 6-7.

[19] *See id.* at 19-20.

[20] *Pace* BIO at 10 n.5.

inadequate disclosure, and uncritically relies on unsubstantiated data.[21]

IV. Finally, respondents argue that no conflict exists among the Circuit Courts and State courts over the issues addressed by the lower courts in this case.

Conveniently, respondents ignore those decisions squarely holding that exhaustion is not required in "fair-share-fee" cases, in direct opposition to the opinions of the lower courts here.[22]

Respondents also err in characterizing as "not remotely in point"[23] the cases the teachers cite for the proposition that a federal court may inquire into whether a "fair-share-fee" notice contains, for example, proper definitions of "chargeable" activities. In *Tierney*, the Court of Appeals for the Sixth Circuit held that the union's "procedures are constitutionally deficient under *Hudson*" because

> the plan returns to dissenters only that portion of union dues expended for *ideological* purposes unrelated to the collective bargaining agreement, while under *Hudson* and *Ellis*, the union must refund the proportion of the fee not related to the negotiation and operation of the collective bargaining agreement.[24]

That is, the union's procedures were unconstitutional at the "notice" level because they embodied a legally incorrect defini-

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[21] *See* PET at 7-8 & n.22-23, 8-9 & nn.24-28 (especially note 27), and 9-11 & nn.29-33.

[22] Tierney v. City of Toledo, 917 F.2d 927, 939-40 (6th Cir. 1990); Gibney v. Toledo Bd. of Educ., 40 Ohio St. 3d 152, 154-57, 532 N.E.2d 1300, 1303-05 (1988), *cited for an entirely different proposition in* BIO at 12-13.

[23] BIO at 13.

[24] Tierney v. City of Toledo, 824 F.2d 1497, 1505, 1506 (6th Cir. 1987).

tion of "chargeable" activities. This is precisely what the teachers contend is wrong with FSN-3 (among other demerits).[25] If the *Tierney* court was correct to hold that such a deficiency in a "fair-share-fee" collection-procedure justifies federal-court intervention prior to the nonunion employees' resort to an internal union appeals-process, then the lower courts in this case must be in error. Certainly a palpable conflict exists between the two decisions.

Similarly, in *Schneider*, the First Circuit Court of Appeals also held that a mandatory-fee scheme "does not * * * meet constitutional standards" because "[i]t defines too broadly the range of activities that may be funded with compulsory dues".[26] Again, this is precisely one of the teachers' complaints against FSN-3. If *Schneider* is correct, the lower courts here are not. Thus, the conflict could not be more obvious.

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[25] PET at 6-8.

[26] Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 640 (1st Cir. 1990).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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